TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1922

No. [redacted]251

DURHAM PUBLIC SERVICE COMPANY, PLAINTIFF IN ERROR,

vs.

THE CITY OF DURHAM.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

FILED JANUARY 18, 1922.

(28,654)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 699.

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vs.

THE CITY OF DURHAM.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

INDEX.

	Original.	Print.
Record from the superior court of Durham County	1	1
Statement of facts on appeal *in re* assessment for pavement of Main street	3	1
Exhibit A—An act to incorporate the Durham Traction Company	16	9
B—An ordinance to authorize the execution of a contract between the City of Durham and the Durham Traction Company	24	14
C—Effect of cost of paving on railway department for 12 months ending September 30, 1920	30	17

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 2, 1922.

	Original.	Print.
D—Estimated effect of cost of paving on railway department for 12 months ending September 30, 1921	32	18
Answer	34	20
Judgment	40	23
Exceptions to findings	46	27
Bond on appeal	50	30
Clerk's certificate	52	31
Docket entries, October 11, 1921	53	31
Judgment	60	36
Petition for writ of error	61	36
Writ of error and order	66	40
Assignments of error	69	41
Bond on appeal	72	42
Stipulation	74	43
Citation and waiver of service	75	44
Clerk's certificate	77	45

1–3 In the Supreme Court, Tenth District, Spring Term, 1921, from Durham.

No. —.

CITY OF DURHAM

vs.

DURHAM PUBLIC SERVICE CO.

Before W. A. Devin, Judge.

Defendant Appealed.

NORTH CAROLINA,
Durham County:

In the Superior Court.

Be it remembered, that at a Superior Court begun, continued and held in and for the County of Durham, State of North Carolina, at the Court House in the City of Durham, on the 15th Monday after the first Monday in March, it being the June term, 1921, before the Honorable W. A. Devin, judge presiding, the following proceedings were had, to-wit:

NORTH CAROLINA,
Durham County:

In re Assessment for Pavement of Main Street.

CITY OF DURHAM

vs.

DURHAM TRACTION COMPANY.

Statement of Facts on Appeal.

This is an appeal from the action of the Board of Aldermen of the City of Durham assessing the Durham Traction Com-
4 pany for the payment of the paving of Main Street in the City of Durham, namely in the sum of $102,942.30; and pursuant to the Statute of the laws of North Carolina, namely Chapter 56 of the Public Laws of 1915, the defendant Durham Traction Company hereby submits statement of facts upon which it bases its said appeal.

The board of aldermen of the City of Durham made out an Assessment Roll in which it assessed the Durham Traction Company in the sum of $102,942.30 for payment of the paving of Main Street

in the City of Durham and in pursuance of notice published in a newspaper the said board met on November 16, 1920, for the purpose of hearing allegations and objections in respect of said assessment; defendant Durham Traction Company appeared at said time set for said meeting, namely November 16, 1920, and presented allegations and objections as to why said assessment should not be made against said Durham Traction Company; that said allegations and objections were put in writing and were filed with the board of aldermen of the City of Durham in the office of the clerk of said board; that on said November 16, 1920, said board of aldermen nevertheless confirmed the assessment against the Durham Traction Company for the paving of Main Street; that within ten days after said confirmation said Durham Traction Company gave due notice in writing of appeal to the Superior Court of Durham County.

That the reasons why said Durham Traction Company should not be assessed for paying for the paving of Main Street in the City of Durham are as follows:

1. In the year 1901 the Legislature of North Carolina by law duly enacted chartered the Durham Traction Company and authorized said Company to exercise certain powers named therein, among them being the power, as set forth in Section 2 thereof, to lay tracks and operate a line of street railway in the streets of the City of Durham, provided the permission of the board of aldermen of the City of Durham had first been obtained; a copy of said charter is hereto attached marked "Exhibit A" and defendant asks that it be taken as part of these objections. On the 4th day of February, 1901, in pursuance of the powers granted under said charter said Durham Traction Company and the City of Durham entered into a contract, which said contract was duly adopted by unanimous vote of the Board of Aldermen of the City of Durham and duly executed by the Mayor of the City of Durham and officials of the Durham Traction Company; that the Board of Aldermen at that time was composed of the following citizens of Durham, viz., M. G. Markham, J. W. Pope, C. C. Taylor, C. A. Jordan, N. M. Johnson, W. A. Guthrie and J. B. Morris; and M. E. McCown was Mayor; and the late V. S. Bryant was City Attorney; that a copy of said ordinance or contract is hereto attached marked "Exhibit B" and this defendant prays that it be made a part of this answer. Section Second of said contract in part reads as follows:

"The said Durham Traction Company whenever it shall be required so to do, shall cause its road bed and track to be brought to surface grade at its own expense and costs, but nothing herein contained shall be construed to require said Durham Traction Company to pave its road bed, but it shall be required to restore the road bed to the condition in which it was at the time of laying said track, provided, however, that if the said City decides to put in or change its sewage pipes on any of the streets of said City on which the tracks of said Durham Traction Company may be laid, the said City may require the said Durham Traction Company to remove and replace at its own expense, the said tracks, for said purpose and said

City shall incur no liability for any delays or interruptions
6 of the business or traffic of the said Durham Traction Company, caused thereby."

This defendant submits that by the terms of said ordinance and contract this defendant entered into said contract with the full understanding and agreement on the part of the City that this defendant should not be required to pave any portion of the streets of the City of Durham; that this contract at the time of its adoption was fully discussed by the governing body of the City of Durham and particularly that portion of said contract dealing with the question of paving and one of the considerations upon which the Street Railway System was built in the City of Durham was that at no time without its consent should said Company be under any obligation whatever to pave the streets of the City of Durham or any part thereof; that this was recognized by the City of Durham and its governing body by the fact that in the year following the passing and adoption of said ordinance, viz., in the year 1902, the City of Durham after resolution offered by Alderman M. G. Markham, entered upon the paving of a certain part of Main Street, viz., from Church Street to Roxboro Street, which was occupied by the tracks of this defendant, with vitrified brick and certain other portions of Main Street with macadam and although the tracks of this defendant, then occupied said street no part of the costs of said pavement was assessed against this defendant and it was not contended by the City that said Company was under obligations to pay any part thereof. That at times subsequent to the year 1902 the City of Durham has paved portions of the streets of Durham occupied by the tracks of this Company but the force of the agreement of the City of Durham was never questioned until the present improvement of the streets of the city
was proposed; and thus by the construction of the contract by
7 the parties thereto, and their acting thereon, the costs of paving of the streets occupied by the Durham Traction Company's tracks were not charged nor any part thereof charged to the Traction Company.

For the reasons set out hereinabove no part of said paving can be assessed against said defendant and this defendant asks that said assessment be stricken out and the costs of said pavement be re-assessed.

2. That in accordance with the said Public Act of Legislature of 1915, Chapter 56, providing that street railway companies shall make such street improvements as shall be directed by the governing body of cities, it is provided that where

"any such company shall occupy such street or streets under a franchise or contract which otherwise provided, such franchise or contract shall not be affected by this act except in so far as this act may be consistent with the provisions of such franchise or contract."

As hereinbefore set forth this defendant occupies the streets of the City of Durham and this defendant submits, therefore, that by

the provision of said Act this Company is not required to pay any portion of said paving and that said assessment should be stricken out; and this defendant hereby pleads said provision in said Act in bar of this assessment.

3. The Durham Traction Company is operating a line of street railway upon the streets, including Main Street, of the City of Durham under a contract with the City of Durham duly authorized by the Legislature of the State of North Carolina and duly executed; that said contract distinctly provides that the Durham Traction Company shall not be required to pave the streets of the City of Durham or to pay any part of the costs thereof; that the act of the City of Durham in assessing said Durham Traction Company with the costs of any part of the paving of the streets of the City of Durham and said Chapter 56 of the Laws of North Carolina of 1915, if it shall be so construed to require the Durham Traction Company to pave any part of the streets of the City of Durham or to pay any part of the costs thereof, is an impairment of the obligation of said contract entered into between the City and defendant Company and is in violation of the Constitution of the United States, Article I, Section 10, Cl. 1; and this defendant hereby pleads said provision of the Constitution of the United States as a bar to said assessment and to the collection of any assessment by the City of Durham and the State of North Carolina against the Durham Traction Company, for the paving of the streets of the City of Durham.

4. That at the time the City of Durham and the Durham Traction Company entered into said contract as hereinbefore set forth the City of Durham was existing as a municipal corporation under and by virtue of a charter granted by the legislature of North Carolina and amended by the Public Laws of 1899, Chapter 235. The provisions of said charter relative to streets, sewers and sewerage, boundaries of streets and the power to borrow money are as follows:

"Among the powers hereby conferred upon the Aldermen are the following: * * *

"To open, grade, build, curb and pave new streets; to repair, widen, ascertain location of, change, keep clean, alter and vary the established streets or grades of streets, alleys and sidewalks in said city; to improve, repair, grade, curb or pave the sidewalks or pavements now established, or that may hereinafter be established in the said city, or cause the same to be improved, repaired, graded, curbed or paved and recover from the owner or occupant of lots (fronting or adjoining the pavements in which curbing or pavement shall be made) one-half of the expense of the work, which expense shall be a lien on the said lot or lots. * * *

"To construct or to contract for the construction of a system of sewerage for the city, and protect and regulate the same, by adequate ordinance; and if it shall be necessary, in obtaining proper outlets for such a system, to extend the same beyond the corporate limits of the city, then in such case the Board of Aldermen shall have proper

power to extend it, and, both within and without the corporate limits, to condemn property for the purpose of right-of-way, or other requirements of the system, the proceedings of such condemnation to be the same as those prescribed hereinafter for condemning private property for streets, or as near as may be, in the manner prescribed in Chapter XLIX, Volume 1, of the Code of eighteen hundred and eighty-three. * * *

"And in order to carry out, execute and enforce the powers hereinbefore given in this section, to borrow money, pledge the faith of the City of Durham, or loan its credit and levy and collect the taxes necessary to pay off and discharge any such debt, principal and interest, with the consent of the majority of the qualified voters of the City."

That under and by the laws of North Carolina the following powers and duties with reference to streets and bridges were imposed upon cities and towns of North Carolina, and therefore upon the City of Durham, at the time of the execution of said contract between the City of Durham and the Durham Traction Company and are now so imposed as set forth in section 2930 of the Revisal of 1905:

10 "The board of commissioners shall provide for keeping in proper repair the streets and bridges in the town, in the manner and to the extent they may deem best; may cause such improvements in the town to be made as may be necessary, and may apportion the same equally among the inhabitants, by assessment of labor or otherwise, and the citizens shall not be liable to work on the public roads without the limits of the town."

That under the charter of the Durham Traction Company its rights to lay and construct tracks, poles and wires and operate street cars upon the streets of the City of Durham rested upon the consent of the Board of Aldermen and its entire right as to the use of said streets was the subject matter of said contract between said City and said Company; that the parties did contract and the contract which they made covered and defined all the rights and obligations of said Durham Traction Company and said rights and obligations and limitations upon said obligations as contained therein were entire and in said contract said City stipulated and agreed that this defendant should not be required to pave the streets of the City occupied by it or any part thereof; and any alteration of said contract or any imposition of any assessment upon this defendant for paying for the paving of the streets of the City of Durham made by the City of Durham under Act of the Legislature of North Carolina is an impairment of the obligations of said contract and contrary to the Constitution of the United States as hereinbefore set forth. That in said contract between the City of Durham and this defendant, this defendant conceded to the City certain rights to be employed in the future by said City, to-wit:

First, the right to use the poles of this defendant for the purpose of stringing such wires thereon as may be needed by the City, and

11 Second, the right to tear up the tracks of this defendant for the extension of the sewerage system of the City of Durham, the cost of the restoration of which was to be borne by this defendant.

Such being the status of the relation of the parties as determined by the law prior to the contract and subsequent to the contract, this defendant submits that the City, acting under Chapter 56 of the Public Laws of 1915, cannot impose upon this defendant any assessment for paving its streets and thereby impair the obligations of said contract nor in any way amend the terms of said contract without the consent of this defendant.

5. This defendant without waiving any of its rights embodied in said contract hereby alleges and submits that said assessment made against the Durham Traction Company apart from said contract is unfair, unreasonable and unjust; that the section of Main Street over which the assessment extends is 2.02 miles in length and the number of miles of tracks of this Company along said street, including double tracks is two and sixty-five one hundredth miles; that there are 154 owners of property abutting upon said portion of Main Street; that the assessment against this Company is $102,942.30 and against said 154 property owners of said section of Main Street is only $89,909.56; that the value of the property of this defendant which is directly affected by said pavement is only $100,000 and the assessed value of said property of the abutting property owners likewise affected by said pavement is over $6,000,000; that therefore it is seen that this defendant's property is taxed more than 100% of its value for paying for the pavement of Main Street, a burden which is unjust and intolerable; that the 154 property owners who receive the direct benefit of said street paving and whose property abuts upon Main Street and had value of more than $6,000,000 are required to pay upon the value of their prop-
12 erty only $89,909.56 or 1½% of said property's value, a burden which is therefore not according to benefit, and for this reason this said assessment should be stricken out and re-assessment made.

6. This defendant in the construction of said street improvements on Main Street, in meeting the paving programme of the City was required to furnish new rails and new cross ties, to take up and relay its tracks and to do considerable other work on said tracks, and by reason of the same this defendant was caused to expend within the past few months the sum of $84,127 upon its tracks on said Main Street; and this defendant has been notified that further expenditure for work of the same sort will be required upon Mangum, Chapel Hill and other streets of the City of Durham, and this additional work will amount to an estimated sum of $125,284; that this defendant was required to make this great expenditure and outlay of money upon its tracks on Main Street solely or almost solely for the benefit of the City of Durham and not for the benefit of this defendant; that this expenditure has already been a grievous burden upon the resources of this defendant; that the net income

of the street railway of the Durham Traction Company, after deducting from the gross receipts, operating expense, maintenance and depreciation, at the present rate of income is 1.38% less than 1 8/10%; that this Company in order to save itself from actual loss was required to go to the Corporation Commission of North Carolina in the summer of 1920 and secure from said Commission an increase in passenger fares; that it is right and just and the law contemplates that all public utilities shall receive a fair return upon their investment and not only is this defendant receiving no fair return upon its street railway investment but is threatened with an actual loss; that if in addition to the burdens at present resting upon the street
13 railway because of said street improvements an additional burden of paying for the paving for the streets of the City of Durham be imposed upon this Company such imposition will be contrary to the rights of this Company, will deny this defendant equal protection of the law and will deprive this Company of its property without due process of law and will be contrary to the Constitution of the United States as set out in Amendments thereto, V and XIV, and will result in the confiscation of its property, and this defendant therefore pleads said confiscation of its property and the said provisions of the Constitution of the United States as a bar to the levying and collecting of this assessment by the City of Durham and State of North Carolina upon the Durham Traction Company; that detailed statements of the financial condition of said Street Railway department showing the gross receipts and the expenditures and showing also the effect of the burdens of this assessment upon this defendant are hereto attached, marked Exhibits C and D, and this defendant prays that they be taken as part of this answer. That the only source from which a deficit in the operation of the Street Railway system can be made up is by an increased charge for passenge fares and such increase cannot be indefinitely employed for that there is a limitation beyond which it is not possible to increase passenger fares as increase beyond such limitation would be prohibitive of riding upon said street cars and would cut off entirely any return from said street railway.

7. That it is well known that burdens imposed upon street railways are finally of necessity paid by the car riders upon the street railway and that it is not fair and right that the paving of the streets of the city, the benefit of which accrues entirely to the property owners upon said streets and to the public, the users of
14 automobiles, wagons and other vehicles upon said Street, should be borne by those making use of said street cars and that it is unjust that such indirect burden should be imposed upon said car riders for the benefit of abutting property owners on Main Street, who are few in number, in fact, who are only 154 in number, and whose property has been greatly enhanced in value and the rental value of the same has been greatly increased and who, as has been stated above are only being required to pay 11.2% of the value of said abutting property upon said paving costs; and that said paving costs should not be borne by those who are both less

able to bear said burden and who have received no benefit therefrom.

8. That further this defendant without in any way waiving its rights under said contract with the City of Durham respectfully submits that even if this defendant were chargeable with any part of said paving the amount stated as the portion of this defendant is incorrect and greatly in excess of the amount which under the law can be assessed against the street railway company. The defendant is informed by the engineer of the City of Durham that the assessment is made according to square yard and ascertaining the area assessable against this defendant the width of the street railway assessed was placed at eight feet, the same including thirty-six inches in width outside the tracks of the Company and where there are double tracks the width assessed is 17.7 feet. The said Chapter 56 of the Laws of 1915 under which the said street improvement has been made, in Section 6 thereof in part reads as follows:

"If the resolution shall provide for a street improvement, it shall direct that any street railway Company or other railroad Company having tracks on the street or streets or part thereof to be improved shall make such street improvement with such material and of such a character as may be approved by the governing body, in that part of such street or streets or part thereof which the governing body may prescribe, not to exceed, however, the space between the tracks, the rails of the tracks, and eighteen inches in width outside of the tracks of such company, and that unless such improvements shall be made on or before a day specified in such resolution, the governing body will cause such improvement to be made."

This defendant submits that therefore if it be assessed at all, which it contends can not be lawfully done, said Company can only be assessed for a width of $6\frac{1}{2}$ feet, that is to say for only "eighteen inches in width outside of the tracks of the Company," and for twice said width or 13 feet where there are double tracks on said street, with a corresponding adjustment where such double tracks merge to single track; and this defendant objects to said assessment for that the amount assessed, even if it be assessed at all by plaintiff City, is greater than it should be by more than $17,000.

Wherefore and for the reasons hereinbefore set forth this defendant asks that no amount of said pavement be assessed against this defendant and that said paving costs be re-assessed in accordance with the provisions of the law as hereinbefore set forth.

This November 15, 1920.

DURHAM TRACTION COMPANY.
By W. L. FOUSHEE,
Attorney.
J. S. MANNING,
Attorney.
W. J. BROGDEN,
Attorney.

16 EXHIBIT A.

An Act to Incorporate the Durham Traction Company.

The General Assembly of North Carolina do enact:

SECTION 1. That Richard H. Wright, Julian S. Carr, A. B. Andrews, and Samuel Regester, and such other persons as are now, or may hereafter be associated with them, their successors and assigns, be, and they are hereby created, constituted and incorporated a body politic and corporate under the name and style of Durham Traction Company, and by that name shall be known in law, shall have the power to contract and be contracted with, to sue and be sued, plead and be impleaded, defend and be defended, in all courts whether at law or in equity, and may have and use a common seal, and the same break, alter, renew or change at pleasure, and may make, ordain, establish and alter or amend, such by-laws, ordinances and regulations, concerning all matters of organization, management and business not herein specifically provided for as the said Company may think proper, and generally may do every and any act and thing necessary to carry this act into effect, and to promote the objects and designs of the corporations; provided, such by-laws, ordinances, regulations or acts be not inconsistent with the laws of the United States or of the State of North Carolina.

SEC. 2. That said Company shall be, and it is hereby empowered and authorized to promote, establish, conduct, and maintain the business of a general street railway, light and power company; to locate, buy, lease, construct, erect, establish, equip, maintain, operate, own or sell, or otherwise acquire and dispose of a line or lines of street railway or railways, and a plant or plants, works, or other necessary equipment, for the generation of electricity, gas,
17 or other materials or fluids, and supply the same for public or private use, for light, power and heat, within the limits of the City of Durham, and within the limits of the County of Durham, as the same are now or may hereafter be laid off, as may be determined upon from time to time by said Company, and over the bridges across any river, creek or stream within said city or county. The said company may locate, lay, erect, construct, equip, maintain, and operate its line or lines of street railway and its poles, wires, subways, conduits, pipes, mains and other fixtures and appliances necessary for the proper, full and convenient carrying on of the business of said Company, in, over and along the roads, avenues, lanes, alleys and other public highways in the said City and County; permission being first had from the Board of Aldermen of the City of Durham for work authorized to be done hereunder within the limits of the said City, and permission being first had from the Board of Commissioners of the County of Durham for work to be done hereunder within the limits of the said County, and outside of the corporate limits of the City of Durham.

SEC. 3. The said Company hereby incorporated may transport freight and passengers over the lines of its railway and collect fare and tolls for same, and may operate its railway system by electricity or other available motive power; the said Company may manufacture, generate, employ, distribute, furnish, buy and sell electricity, the electric current, gas or other suitable and proper materials or fluids, for public and private use, for light, heat and power, or other purposes, for its own use and for distribution and sale, for any or all said purposes, to all persons, firms and corporations upon such terms as may be agreed upon by the contracting parties, and may purchase and sell appliances and fixtures in connection with
18 and for the purpose of introducing its light, heat and power into general use.

SEC. 4. The capital stock of said Company shall be Ten Thousand Dollars, with liberty to increase the same at any time, to any sum not exceeding One Million Dollars, as a majority of the stockholders may determine; said stock to be divided into shares of the par value of One Hundred Dollars each. Said capital stock may be divided into Common and Preferred in such proportion as the stockholders by unanimous vote may decide. Subscriptions to the capital stock may be received by the incorporators herein named, or any three of them, at such time and place as they may appoint, and with or without public notice, as they may deem best, and as soon as the minimum of the capital stock has been subscribed said subscribers may organize as a corporation and proceed to elect a board of directors consisting of not less than three nor more than nine, stockholders, and such officers as may be required by the by-laws of said Company, and shall thereupon be deemed fully organized and have and exercise all the powers and functions of a corporation under this charter and the laws of the State; provided work shall commence upon the construction of said Company's street railway within two years from the passage of this act.

All subscriptions to the capital stock of said Company shall be upon such terms and conditions and under such regulations as the board of directors may prescribe; and the directors may receive money or labor, material, bonds, stocks, services, real or personal property, leases, options, rights of way, and other rights or easements, or the capital stock of other corporations, in payment of subscriptions to the capital stock of the Company hereby incorporated at their actual value in money, such valuation to be
19 agreed upon between the directors and subscribers, and may make such subscriptions payable in such manner and amounts and at such times as the directors may determine. No stockholder of said Company shall be held liable or made responsible for the debts or liabilities of said Company in a sum beyond any balance due from such stockholder to said Company or shares subscribed for by such stockholder.

SEC. 5. The Company hereby incorporated may acquire by lease, purchase, subscription to, or purchase of the capital stock, or otherwise, the works, tracks, property, franchises, rights, privileges, and

immunities, including the right to be a corporation, of other like companies chartered under the laws of this or other States, and may own, buy, sell, lease, use, operate, maintain, and extend the same, and power is hereby conferred upon other like companies chartered under the laws of this or other States to transfer by sale or lease all their works, tracks, property, franchises, rights, privileges, and immunities, including the right to be a corporation, to the Company hereby incorporated, or to unite and consolidate with it upon such terms as may be agreed upon between them. The said Company hereby incorporated may purchase or otherwise acquire and hold the stock and bonds of any other Company or corporation chartered under the laws of this or other States; and it may acquire and hold by purchase, lease, or in any other manner, the plant, works or other property of any company, firm or individual now engaged or which may hereafter engage in a similar business in said City or County, and may likewise acquire and hold, or afterwards sell, any other property necessary, to the conduct of the business of the said Company hereby incorporated, and may make payment for such railways, plants, works, franchises, rights, or other property, in money, or by issuing bonds, notes or stock therefor.

20 SEC. 6. It shall be lawful for any corporation or company, and they are hereby empowered, to subscribe for, purchase, or otherwise acquire and hold, or guarantee, the stock or bonds of the said Company hereby incorporated, and the said Company hereby incorporated may sell, lease or convey its property, privileges and franchises to any other such Company.

SEC. 7. The said Company hereby incorporated may take and acquire by purchase, lease, condemnation or otherwise, and hold, or thereafter sell or otherwise dispose of, the lands required for the right of way for its railways, stations, yards, side-tracks, shops, power-houses, terminals, and operating facilities, plants and works, but the mode of condemning any lands or rights shall be the same provided by the general laws of this State for the condemnation of lands by and for the use of railroad Companies, as specified in Chapter forty-nine (49) of the Code, and said Company shall also have the right to acquire by purchase and hold other lands not exceeding ten acres in said City of Durham, nor more than five hundred acres in said County of Durham, in or through which it may be operating or intending to operate, and it is hereby empowered and authorized to sell, lease, convey, and encumber the same, as may be necessary or proper for the conduct of its business and the prosecution of its work.

SEC. 8. The principal office of the said Company shall be in the City of Durham, or such other place in the State of North Carolina as may be deemed convenient or necessary by the board of directors of said company for the conduct of its business.

SEC. 9. And the said Company, in addition to its other rights and privileges, shall have the right, and it is hereby author-
21 ized and empowered, to promote, establish, construct, operate

and maintain, buy, lease, operate, own or sell, or otherwise acquire and dispose of a plant, works, machinery, and other necessary fixtures and appliances for the manufacture of artificial ice, or any plan and by any process it may approve, the same to be located in any City, town or place in the said County of Durham, which the said Company may determine upon, and to that end it may buy, sell, and deal in all materials necessary for the manufacture of artificial ice; may use and employ steam, water, or electric power; and may buy, sell or distribute ice upon such terms as may be agreed upon between the contracting parties.

SEC. 10. It shall be lawful for said Company, and it is hereby authorized and empowered, to borrow money, make, execute, issue and sell or negotiate its bonds from time to time for such sums and on such terms and for such price as its board of directors may deem expedient and proper for any of the purposes of said Company; and may secure the payment of said bonds by mortgages, or deeds of trust, upon all or any portion of its property, real, personal or mixed, its contracts, rights, franchises, and privileges, including its right to be a corporation, and it may, as the business of the Company shall require, sell, lease, convey, and encumber the same. The said Company shall have the right to lend or otherwise invest, its accumulated funds or surplus; to purchase and own the stock or bonds of any other Company or corporation, and to sell or otherwise dispose of the same at its pleasure.

SEC. 11. The said Company hereby incorporated is authorized and empowered to use, on any portion of its line or lines of railway, the track of any other railway Company, with the consent of said other railway Company; and may cross with its track either at, above or below grade the tracks of any railroad Company.

22 The said Company is authorized and empowered to locate, construct, equip, operate, and maintain any lateral or branch roads, or tramways, not exceeding twenty miles in extent, and by such route or routes as may be selected by its board of directors, the said Company may purchase or lease any such lateral or branch road which may be constructed; together with all the rights, powers, properties, privileges and franchises appertaining thereto, and may pay for the same with money or by issue of its stock, notes or bonds. And said Company may connect or unite its road with that of any other company or companies, or consolidate or merge its stock, property and franchises with and into any other company or companies operating or authorized to operate a connecting railway or railways, upon such terms and under such name as may be agreed upon between the Companies to uniting or connecting, merging or consolidating, and for that purpose power is hereby given to it and to such other company or companies to make and carry out such contracts as will facilitate and consummate such connection, merger or combination, or any lease or sale.

SEC. 12. Any person who shall deface, injure, destroy, remove or obstruct said railway, or any part thereof, or any of the cars, trains, coaches, or carriages thereof, or any of the fixtures, property or ma-

chinery thereof, or any of the other works, poles, wires, pipes, fixtures, appliances, structures, machinery, or property of any kind of the hereby incorporated Company, shall be guilty of a misdemeanor and fined or imprisoned within the discretion of the Superior Court.

SEC. 13. That any person or persons who shall cast, throw, shoot, propel or project or in any wise put in motion any stone, rock, shot, pellet or other missle of any kind or nature, at, against, or into any car, carriage, coach or train upon said railway, whether the
23 same be in motion or at rest with intent to injure any such car, carriage, coach or train or any person therein or thereon, or any horse or other animal attached thereto or connected therewith, shall be guilty of a misdemeanor and fined or imprisoned within the discretion of the Superior Court.

SEC. 14. Any person who shall unlawfully injure or destroy, or having the right to prevent it shall permit to be injured or destroyed any meter, pipe, conduit, wire, pole, lamp, or other apparatus belonging to the Company hereby incorporated, or who shall unlawfully prevent an electric or gas meter from duly registering the quantity of electricity or gas supplied, or in any way interfering with its proper action or just registration, or who shall without the consent of the said Company divert any electric current from any wire of said Company, or who shall otherwise unlawfully use or cause to be used without the consent of the said Company any electricity or gas manufactured or distributed by said Company, shall upon conviction thereof be deemed guilty of misdemeanor and fined or imprisoned within the discretion of the Superior Court.

SEC. 15. The motormen, conductors, and other agents and servants of said Company, while in the active service of said Company or in the discharge of any duty connected therewith, are hereby vested with the same power, authority and privilege which belong to similar officers and agents of the railroad Companies in this State, and in addition to the general powers conferred upon such agents and officers, they may eject and remove from any of the cars, carriages or coaches of said railroad Company any person or persons who fail or refuse to pay their fare according to the rules and regulations of said Company, and they, the said officers and agents, may eject and remove all drunken, profane and disorderly persons
24 from any of the conveyances or cars of said Company at any time, whether the fare of said drunken, disorderly or profane person has been paid or not, and the said Company, its agents or officers shall not be liable civilly or criminally therefor unless he use greater force than is necessary to eject such person.

SEC. 16. All laws or clauses of law in conflict with this act are hereby repealed.

SEC. 17. This act shall be in force from and after its ratification.

In the General Assembly read three times and ratified this 29th day of January, A. D. 1901.

W. D. TURNER,
President of the Senate.
WALTER E. MOORE,
Speaker of House of Representatives.

EXHIBIT B.

An Ordinance to Authorize the Execution of a Contract Between the City of Durham and the Durham Traction Company.

1. Be it ordained by the Board of Aldermen of the City of Durham, that the Mayor of the said City and the Clerk of the Board of Aldermen, be, and they are hereby authorized and directed to enter into a contract for and in the name of the said city with the Durham Traction Company for the construction and operation of a street railway and the carrying on of the business of an Electric Company in the City of Durham, and that the Clerk of the Board of Aldermen be, and he is hereby authorized and directed to affix the seal of the City of Durham thereto and to duly attest the same.

25 2. The said contract shall be as follows:

This agreement, executed in duplicate, made and entered into this the 4th day of February, 1901, by and between the City of Durham, a municipal corporation, party of the first part, and the Durham Traction Company, a corporation duly organized and existing under the laws of the State of North Carolia, party of the second part.

Witnesseth: That whereas, the said Durham Traction Company desires to construct, operate and maintain a Street Railway in the City of Durham, and to construct, operate and maintain a plant and all necessary poles, wires and other appliances for the sale of electric current, for the purpose of lighting and furnishing light and power in the City of Durham, and.

Whereas, the said City of Durham desires to have said Durham Traction Company operate its said street railway and conduct its said business in the City of Durham, and.

Whereas, The Durham Traction Company is the assignee of an exclusive franchise granted to the Durham Street Railway Company on the 11th day of January, 1887, by the Town of Durham, and a Contract between the Town of Durham, and the Durham Consolidated Land and Improvement Company, assignee of said Durham Street Railway Company, dated November 9, 1891, wherein it is agreed that the Town may remove the tracks of said Durham Street Railway Company but that said removal shall be without prejudice to the rights of said Company under said exclusive franchise, and.

Whereas, the said Durham Traction Company is willing to surrender said franchise and contract and have the same cancelled upon the execution of the contract herein contained.

26 Now, therefore, in consideration of the premises and their mutual promises, it is agreed as follows:

First. Said City of Durham, party of the first part, does hereby give, grant and convey to the said Durham Traction Company, a corporation duly existing under the laws of the State of North Carolina, its successors and assigns, the right, privilege and franchise to locate, lay, construct, operate and maintain a Street Railway with single or double tracks as may be decided best by its directors, with all necessary switches, cross-overs, and turn-outs, within the limits of the City of Durham for the carrying of passengers and freight under and subject to the conditions, privileges, and limitations, hereinafter set forth, on over and along the following route, to-wit: Beginning at Main and Dillard Streets a double track westwardly on, over and along Main Street from Dillard Street to Five Points (the place called Five Points being formed by the junction of Main, Green and Morris Streets); thence by a single track from Five Points westwardly on, over and along Main Street in the direction of Trinity College to the corporate limits; and by a single track from Five Points westwardly on, over and along Green Street to Chapel Hill Street, and thence on, over and along Chapel Hill Street toward the cemetery to the corporate limits; and from the corner of Main and Mangum Streets by a single track northwardly on, over and along Mangum Street to the corporate limits; and from the corner of Main and Dillard Streets eastwardly on, over and along East Main Street in the direction of Edgemont to the corporate limits; and by a single track from the corner of Main and Dillard Streets, on over and along Dillard Street to Ramseur Street; thence on, over and along Ramseur Street to the corporate limits; and on, over and along Corcoran Street between Main Street and Peabody
27 Street; and to this end, and for the purpose of operating its cars on such of the streets and avenues and thoroughfares herein specified as it may elect, the said Durham Traction Company, party of the second part, is hereby authorized and empowered to lay, locate and erect its tracks, poles, wires and other appliances and appurtenances necessary and proper, and to run and propel its cars for freight and passenger traffic on, over and along said routes and on, over and along the said portions of said avenues and streets, and on, over and along any bridges which may now or hereafter be constructed on any of the said streets herein before specified; and the said Durham Traction Company shall have the right to erect its poles for its trolley, light and feed wires along the sidewalks of the said streets, avenues and thoroughfares.

Second. The said tracks of the said Durham Traction Company, shall be located in the center of all of the said streets, avenues and thoroughfares. The center of the said streets, avenues and thoroughfares shall be marked by the Street Commissioner of the said City whenever he shall be called upon by the said Durham Traction Company, and he shall forthwith certify to the President of the Durham Traction Company that he has so marked the center of the streets, avenues and thoroughfares with the date of their marking. The

poles, wires, and appliances of the said Railway shall be erected and placed under the supervision of the said Street Commissioner, and he shall certify his approval of the poles, wires and appliances and the manner of erecting and placing them, to the President of the said Durham Traction Company. As soon as the said tracks are completed and the poles, wires and appliances are erected and placed, the portions of the streets and avenues that may have been used for these purposes shall be repaired and restored at said company's cost
28 and expense to their former condition so far as they may have been damaged by the placing and erecting of the tracks, poles, wires and appliances. The said Durham Traction Company in laying its track upon the route herein described, on, over, and along the streets and avenues, shall follow the grade to be designated by the Street Commissioner, and it shall be his duty upon the application of said Durham Traction Company to furnish it with grades. The said Durham Traction Company whenever it shall be required so to do, shall cause its roadbed and track to be brought to surface grade at its own expense and costs, but nothing herein contained shall be construed to require said Durham Traction Company to pave its roadbed, but it shall be required to restore its roadbed to the conditions in which it was at the time of laying said track, provided, however, that if the city decides to put in or change its sewerage pipes on any of the streets of the said city on which the tracks of said Durham Traction Company may be laid, the said city may require the said Traction Company to remove and replace, at its own expense, the said tracks, for said purpose and said city shall incur no liability for any delays or interruptions of the business or traffic of said Traction Company, caused thereby.

Third. The said Durham Traction Company may operate its cars along the routes hereinbefore described by electricity, and it may change its motive power hereafter to any other power by and with the consent of the board of aldermen, and may run its freight cars and deliver merchandise of all kinds along its lines aforesaid, taking care not to unreasonably obstruct the street thereby.

Fourth. The said Durham Traction Company shall have the power to erect, maintain and operate all necessary buildings, power
29 houses, and machinery for the operation and conduct of its business as a street railway and electric company.

Fifth. The said Durham Traction Company agrees to so run its cars as to render a fair, adequate and reasonably satisfactory service to the people upon the routes herein before set forth at the completion of the railway, and at all times to keep its track, roadbed and cars in proper condition unless prevented by providential interference or some unavoidable circumstances. And the said Durham Traction Company further agrees that the said City of Durham may string its fire alarm and police signal wires on the posts or poles of the said Durham Traction Company; provided that such fire alarms or police signal wires do not interfere with the cars or the trolley and feed wires of the said Durham Traction Company.

Sixth. Said Durham Traction Company agrees that the maximum limit of fare or price charged for passengers, for one continuous trip

between the points within the corporate limits of the city; or between East and West Durham, shall be five (5 c.) cents.

Seventh. The privileges and franchises hereby and herein granted and conveyed shall extend and be in force for a period of fifty years from the date of this contract. The said work of construction shall begin within six months from date of this contract, and shall be pushed diligently, and so far as possible, without interruption, or cessation toward conclusion; and the said Company shall within twelve months from the date of this contract have their cars in operation upon that part of said route elected by it to be first constructed.

Eighth. It it agreed that execution of this contract by the
30 officers of the Durham Traction Company shall act as annulment and cancellation of the aforesaid contract, dated January 14, 1887, and November 9, 1894, respectively.

In testimony whereof, the said City of Durham has caused this agreement to be signed by the mayor and the clerk of the board of aldermen and the seal of the said city to be placed thereon, duly attested by the city clerk, and the said Durham Traction Company has caused this agreement to be sealed with its corporate seal and to be signed by its president and secretary.

M. E. McCOWN,
Mayor of Durham.

Attest:

[Seal of the City of Durham.]

GEO. W. WOODWARD,
Clerk of the Board of Aldermen.

DURHAM TRACTION COMPANY,
By R. H. WRIGHT,
President.

Attest:

[Corporate Seal.]

J. S. MANNING,
Secretary.

EXHIBIT C.

Effect of Cost of Paving on Railway Department for Twelve Months Ending September 30, 1920.

Gross Operating Revenue	$159,133.70
Operating Cars	55,840.52
Electric Power	14,124.33
Traffic and General	21,791.99
31	
Miscellaneous	5,066.69
Taxes	4,055.72
Total Operation	$100,879.25

Maintenance Ways and Structures	$28,902.61
Maintenance Equipment	18,981.88
Total Maintenance	$47,884.49
Less Extraordinary Maintenance	16,725.49
Corrected Maintenance	$31,159.00
Operating Expense	$132,038.25
Depreciation 5% on $383,964	19,198.20
Total Deduction from Gross Revenue	$151,236.45
Net Revenue	$7,897.25
Per Cent. Return	1.38%
Depreciable Investment, 12/31/19	$383,964.00
Non-depreciable Investment, 12/31/19	187,871.00
Total Investment, 12/31/19	$571,835.00
Eight Per Cent. on Investment	$45,746.80
Loss	$37,849.55

32 If Cost of Paving is Added.

Net Revenue		$7,879.25
Paving Tax	$13,260.00	
Dep. 5% on $102,000	5,100.00	
		18,360.00
Corrected Net Revenue—Loss		$10,480.75
Per Cent. Return—Loss		1.83%
Eight Per Cent.		$45,746.80
Loss		$56,227.55

EXHIBIT D.

Estimated Effect of Cost of Paving on Railway Department for 12 Months Ending September 30, 1921.

Gross Revenue	$175,000
Operation Cars	61,200
Electric Power	18,000
Traffic and General	18,000
Miscellaneous	5,000
Taxes	6,000
Paving Tax and Interest	13,260
Total Operation	$121,460

Maintenance Ways and Structures	$14,000
Maintenance Equipment	18,000
Total Maintenance	$32,000

33

Total Operation and Maintenance	$153,460
Paving Dep., 5% on $102,000	5,100
Depreciation at 5% on $392,837	19,642
Total Deduction from Gross	$178,202
Net to Bond Interest, Dividends and Profits—Loss	$3,202
Per Cent. Return on Total Investment of $581,408—Loss	0.55%
Fair Return, 8% on $581,408	$46,513
Loss	$49,715
Depreciable Investment 9/30/20	$392,837
Non-depreciable Investment 9/30/20	185,571
Total Investment 9/30/20	$581,408

Without Paying for Paving.

Net as Above—Loss		$3,202
Paying Tax and Interest	$13,260	
Paving Depreciation	5,100	
		18,360
Net with Paving Removed		$15,158
Per Cent. Return on $581,408		2.61%
Fair Return of 8% on $581,408		$46,513
Loss		$31,355

34 *Answer.*

NORTH CAROLINA.
Durham County:

In the Superior Court.

CITY OF DURHAM

vs.

DURHAM TRACTION COMPANY.

The City of Durham for an Answer to the Statement or Complaint, filed in the above entitled action, alleges:

First. It is admitted that the Durham Traction Company is a corporation, duly organized and existing, under and by virtue of a charter granted to it by the Legislature of the State of North Carolina—Session of 1901, authorizing said company to construct and operate a system of street railway in the City of Durham, after having first obtained permission of the governing authority of said city, which permission, it is admitted was duly given.

That at the time of granting said permission the City of Durham, acting under and in the exercise of its delegated authority, ordained and prescribed certain conditions to be kept and performed by said Durham Traction Company, in the use and occupation of the streets by said company, but the City of Durham expressly denies that it agreed by contract, or otherwise to relieve or exempt said company from the obligation and duty of paving its roadbed at such time as the convenience and safety of the public might demand, and when said city, acting under legislative authority might require, and denies that it agreed, by contract or otherwise, to relieve or exempt said company from the payment of assessments duly levied covering the cost of any such improvement, done by
35 and at the expense of the city, after notice, and pursuant to law.

The City of Durham further says, that if the parties mentioned as aldermen in paragraph 1 of said Statement or Complaint, attempted by contract or otherwise, to relieve said street railway from the obligation of paving its roadbed, or relieve or exempt it from the payment of assessments, duly levied, incident to such paving, that such attempted action on the part of said aldermen was ultra vires, and void for the reason that said aldermen had no authority in law, either express or implied, to make or enter into any such agreement, contract or arrangement, or in any other manner relieve said street railway company from paving its roadbed, and that said aldermen had no authority in law, either express or implied, to relieve or exempt said street railway company from the payment of assessments, duly levied incident to and covering the cost of such paving when done by the city, after notice, and upon failure of said company to perform and complete such work, pursuant to such authority re-

served by the state, and in particular the power and authority subsequently delegated in Chapter 56 of the Public Laws of 1915.

As to the other matters and things set out in paragraph 1 of said Statement or Complaint relative to the construction of the alleged contract, the City of Durham says that such allegations are argumentative and inferential, and are matters of opinion and conclusions of law, and the City of Durham is not required to answer same, and for said reasons the City of Durham renews its motion to strike such matters from paragraph 1 of said Statement or Complaint, but if required to answer, it realleges, that at the time it granted permission to said Durham Traction Company to construct and operate said street railway system over the streets of said city, it did
36 not then, or at any subsequent time, agree to relieve or exempt said street railway company from the duty and obligation of paving its roadbed, or relieve or exempt said company from the payment of such assessments, in connection with such work as might be duly levied pursuant to law.

Second. That the allegations contained in paragraph 2 of the said Statement or Complaint relative to the construction and application of the provisions of said Chapter 56 of the Public Laws of 1915 are matters of opinion and conclusions of law, and this defendant is not required to answer same, and for said reasons this defendant renews its motion to strike such matters from paragraph 2 of the Statement or Complaint, but if required to answer, the City of Durham denies that said Durham Traction Company is relieved or exempt from paving its roadbed, or that it is relieved or exempt from the payment of the assessment complained of, for the reason that said railway company has never been so relieved or exempted by any act or law authorized, sanctioned or approved by the Legislature of the State of North Carolina; and the City of Durham expressly denies that said assessment should be stricken out.

Third. The City of Durham expressly denies that it entered into any such contract as alleged in paragraph 3 of the Statement or Complaint, and expressly denies that the application and enforcement of the provisions of said Chapter 56 of the Public Laws of 1915, under authority of which this defendant seeks to recover the cost of paving, as set out in said Assessment Roll, in any manner impairs the obligation of the alleged contract for the reasons herein before and hereinafter set out.

Fourth. It is admitted that the City of Durham was at the time mentioned, and is now existing and acting as a municipal
37 corporation, under and by virtue of a charter granted to it, and has been and is now acting under and in accordance with the authority contained in said charter and amendments thereto, its police powers, and statutes duly enacted by the Legislature of said state delegating to the City of Durham additional powers and authority, and in particular those contained in Chapter 56 of the Public Laws of 1915.

The City of Durham denies that the entire right to the use of the

streets of said city was a subject matter of contract between the parties hereto, and re-alleges that it did not enter into a contract, relieving and exempting said street railway company from paving its roadbed, or relieving or exempting it from the payment of paving assessments, duly levied, in connection with such improvement made by the city, after due notice, and expressly denies that it ever in any manner released control of its streets, and denies that it ever surrendered, or attempted to surrender any of its reserved powers, or like powers of the state, in particular the power and authority to require said street railway company to pave that portion of the streets occupied by its tracks and eighteen inches outside of same, and upon failure to perform and complete such work, after notice, to have such work done and charge or assess the cost thereof against said railway company.

It is admitted that one of the conditions required to be performed by said Durham Traction Company incident to the grant of the permission hereinbefore mentioned was, that the City of Durham should have the right and privilege to use the poles of said stret railway company for stringing fire alarm wires of said city. Except as herein admitted the allegations contained in paragraph 3 of said Statement or Complaint are denied.

38 Fifth. The City of Durham denies that said assessment is unfair, unreasonable and unjust, and alleges that the property of the Durham Traction Company assessed for said improvement belongs to a different class from that of the abutting property owners, and no greater portion of said company's property was assessed, nor any greater amount charged than that authorized and sanctioned by law, and except as herein admitted paragraph 5 of the Statement or Complaint is denied.

Sixth. The City of Durham has no knowledge or information as to what amount said Durham Traction Company has spent upon its tracks on Main Street, or elsewhere, other than that statement contained in paragraph 6 of said Statement or Complaint. It is admitted that said company has on two previous occasions, upon petition to the corporation commission, sought and obtained increased passenger rates. The City of Durham alleges that if said Durham Traction Company is financially embarrassed it still has the right and privilege to make further application to said commission for a further increase in rates, but the City of Durham denies, that merely because said company is unable to earn a fixed return upon the valuation of its property that it can escape the obligation imposed of paving its roadbed, or in lieu thereof, the payment of an assessment, duly levied, covering the cost of such work. The City of Durham expressly denies that the levy and proposed collection of the assessment complained of, is without due process of law, or that same will work a confiscation of defendant's property, and except as herein admitted paragraph 6 of the Statement or Complaint is denied.

Seventh. The City of Durham re-alleges that the assessment levied against said Durham Traction Company was duly made ac-
39 cording to law, and that the matters and things set out in paragraph 7 of said Statement or Complaint are argumentative and inferential, irrelevant and redundant, and the City of Durham renews its motion to strike such matters from paragraph 7 of said Statement or Complaint, but if required to answer, this it admits that said assessment will finally be paid by the car riders, and except as herein admitted the allegations of paragraph 7 are denied.

Eighth. The City of Durham re-alleges that said assessment was duly made according to law, and expressly denies that said Durham Traction Company has been assessed in any sum greater than that authorized by law, and except as herein admitted the allegations contained in paragraph 8 of said Statement or Complaint are denied.

Wherefore, the City of Durham prays that the Statement or Complaint filed in the within entitled action be dismissed and that the City of Durham recover its cost to be taxed by the Clerk and for such other relief as the court may grant.

S. C. CHAMBERS,
Attorney for City of Durham.

NORTH CAROLINA,
Durham County:

M. E. Newson, Jr., being duly sworn, says that he is mayor of the City of Durham; that he has read the foregoing answer and that the same is true to his own knowledge except as to those matters and things therein stated on information and belief and as to those he believes them to be true.

M. E. NEWSOM

Sworn and subscribed to before me this the 10th day of February, 1921.

E. B. MOSS,
Notary Public.

My commission expires the 25th day of September, 1921.

40 *Judgment.*

NORTH CAROLINA,
Durham County:

CITY OF DURHAM

vs.

DURHAM PUBLIC SERVICE COMPANY.

This cause coming on to be heard and being heard without the intervention of a jury, it being agreed by counsel of both plaintiff and defendant that the court may find the facts, the court does find the following facts:

1. That in the year 1901 the Legislature of North Carolina chartered the Durham Traction Company, which name has since been changed to Durham Public Service Company, and authorized said company to lay tracks and operate a line of street railway in the City of Durham, provided the permission of the board of aldermen of the City of Durham be first obtained; that on February 4, 1901, in pursuance of said charter the board of aldermen, by a unanimous vote granted such permission as will appear by reference to Exhibit B, a copy of which is annexed to the complaint or petition of the Public Service Company; that under said ordinance the Traction Company laid its tracks on Main Street of the City of Durham and on other streets, that Section Second of said ordinance reads as follows:

"The said Durham Traction Company whenever it shall be required so to do, shall cause its roadbed and track to be brought to surface grade at its own expense and costs, but nothing herein contained shall be construed to require said Durham Traction Company to pave its roadbed, but it shall be required to restore the roadbed to the condition in which it was at the time of laying said track, provided, however, that if the said city decides to put in or change its sewerage pipes n any of the streets of said city on
41 which the tracks of said Durham Traction Company may be laid, the said city may require the said Durham Traction Company to remove and replace at its own expense, the said tracks, for said purpose and said city shall incur no liability for any delays or interruptions of the business or traffic of the said Durham Traction Company, caused thereby."

2. That in the year 1902, the City of Durham paved Main Street from Church Street to Roxboro Street with vitrified brick and paved certain other portions of Main Street with macadam; that Main Street was at that time occupied by tracks of said company; but no part of the paving of said street was assessed against said company or abutting owners; that at times subsequent to the year 1902, but prior to the year 1915, the City of Durham paved portions of the streets of the city occupied by the tracks of said company, but the City of Durham did not charge or assess any part of said paving against said company or against abutting owners.

3. That in the year 1915, by Chapter 56, Section 6 (now C. S. 2708, sub. sec. 3) of the Public Laws of North Carolina of that year it was and is provided that street railway companies should make such street improvements as shall be directed by the governing body of the cities, but it is provided that where "any such company shall occupy such street or streets under a franchise or contract which otherwise provided, such franchise or contract shall not be affected by this act, except in so far as this act may be consistent with the provisions of such franchise or contract."

4. That the charter of the City of Durham sets forth certain powers conferred upon the board of aldermen with reference to

streets, sewers, boundaries of streets and the power to borrow
12 money and that in Section 2930 of the Revisal of 1905, certain powers of a municipality over its streets and bridges are set forth.

5. That the section of Main Street over which the assessment extends is 2.02 miles in length and including double tracks there are 2.65 miles of track on Main Street; that there are 154 abutting property owners upon this portion of Main Street; that the assessment against said company for paving Main Street is $102,942.30 and against said 154 property owners is $89,909.56; that the value of the property of this defendant on Main Street within the area which is directly affected by said paving is $100,000 and the assessed value of said abutting property is approximately $5,083,250 exclusive of the value of property on Main Street not taxed.

6. That the cost to the Traction Company of furnishing new rails and new cross ties, of taking up and relaying its track on Main Street and doing other work preparatory to the placing of the pavement upon Main Street was $75,108.85, which has been paid by the Traction Company and which said outlay and expenditure was made at the order of the City of Durham; that during the twelve months ending May 31, 1921, the company's railway showed a loss of $17,388.73 of meeting the operating expense and allowance for depreciation and if the company is required to pay the paving assessment of the City of Durham as demanded, to-wit, one-tenth of said assessment each year with interest, then there will be an additional expense of one-tenth of $102,942.30 plus interest and depreciation on same; that the gross earnings of said company from all sources for the year ending December 31, 1920, were approximately $540,000, the net earnings $147,000, the company having other valuable property and business not on Main Street, including other railway not on Main Street.

43 7. That said Chapter 56 of the Public Laws of 1915, Section 6, provided that:

"If the resolution shall provide for a street improvement it shall direct that any street railway company or other railroad company having tracks on the street or streets or part thereof to be improved shall make such street improvement with such material and of such a character as may be approved by the governing body, in that part of such street or streets or part thereof which the governing body may prescribe, not to exceed, however, the space between the tracks, the rails of the tracks, and eighteen inches in width outside of the tracks of such company, and that unless such improvements shall be made on or before a day specified in such resolution the governing body will cause such improvement to be made."

The court finds as a fact that the space between the rails of single track lines is a distance of four feet, eight and one-half inches; that the head of the rail is two and one-half inches wide; that the length

of the cross tie is seven feet ten inches; that the city assessed a track strip eight feet in width where the track is single; and where there are double tracks the width assessed was a strip 17.7 feet, there being a space of five feet between the inside rails of the double track.

The court holds that the cross ties and rails constitute the track; the court finds as a fact that the city assessed the company for a strip eighteen inches wide on the outside of each rail where the track is single and on the outside of each extreme rail where the track is double; that if the city assess the company for only eighteen inches in width outside the rails of the track the amount of the assessment against the company would be $15,525.36 less than the amount actually assessed, but the court finds as a fact that the city did not assess the company with the cost of paving for a width in excess of six inches beyond the end of the company's cross ties.

8. Upon the foregoing facts the said company requested the court to hold as follows:

(1) That the City of Durham, acting through its board of commissioners, had on the 4th of February, 1901, power to enter into a contract with the Durham Traction Company executed as of that date.

(2) That the contract executed on the 4th of February, 1901, and which was offered in evidence, and a copy of which is attached to the petition or complaint, contained an agreement that the Durham Traction Company should not be required to pave its roadbed or any part thereof.

(3) That the said contract is obligatory upon the parties thereto until the same is changed by consent of the parties or modified by their consent.

(4) That there has been no modification or change or alteration of this provision or stipulation of the said contract.

(5) That the ordinance adopted by the board of aldermen of the City of Durham requiring the Durham Traction Company to pave its roadbed and assessing against the said Durham Traction Company the sum of $102,942.30 as the cost of doing said work, impaired the obligation of the contract between the city and the Durham Traction Company, and was invalid and is contrary to Article 1, Section 10, Clause 1 of the Constitution of the United States.

(6) That the act of the Legislature of North Carolina, to-wit: Chapter 56 of the Public Laws of 1915, Section 6, did not and could not confer upon the City of Durham, acting through its board of aldermen, the right to violate its contract with the Durham Traction Company.

(7) That the assessment made upon the Durham Traction Company was unreasonable and excessive and discriminatory, and not proportioned to the benefits received by the Traction Company, but

a mere arbitrary amount, disregarding such benefits and deprives the Traction Company of the equal protection of the law as guaranteed by Amendments V and XIV of the Constitution of the United States.

(8) That the value of the property of abutting land owners on the said street was about $6,000,000.

(9) That the value of the property of the street railway company on Main Street in the paving district was about $100,000.

(10) That the assessment made by the city upon the abutting property owners of the benefits received by them from the paving was $89,909.55, whereas, the assessment made upon the Durham Traction Company was $102,942.30.

(11) That the City of Durham in doing the work of paving Main Street had required the Traction Company to relay its track on Main Street with heavier and different rail and with new cross ties at a cost to it of $75,108.85, and that to enforce the collection of this assessment would be a discrimination against the Durham Traction Company and the taking of its property wrongfully, unjustly, arbitrarily and oppressively, and without due process of law.

(12) That after the contract of February 4, 1901, was entered into, the City of Durham paved a part of Main Street occupied by the track of the Durham Traction Company with brick, but charged no part of the said paving to the Durham Traction Company or abutting property owners.

46 (13) That the City of Durham in paving its streets occupied by the Durham Traction Company under the contract of February 4, 1901, charged no part of the paving on any part of said streets to the Durham Traction Company.

(14) That on other streets on which the Durham Traction Company street car tracks were laid, the City of Durham, subsequent to the 4th of February, 1901, but prior to the year 1915, macadamized certain parts of said streets so occupied by the tracks of the Durham Traction Company but charged no part of the expense thereof to the Durham Traction Company or abutting property owners.

(15) That such paving was done at different times prior to the year 1915, and by different boards of commissioners or boards of aldermen of the said Town of Durham.

His honor declined to hold that the said ordinance of February 4, 1901, prevented the City of Durham from making the assessment against the Durham Traction Company for the paving of Main Street of said city, the street on which the street car company operated its lines under said ordinance of February 4, 1901. The Durham Traction Company excepted to this ruling and assigns same as error.

Exception No. 1.

His Honor further declined to hold that the assessment was arbitrary or unjust or oppressive. The Durham Traction Company excepted to this ruling and assigns same as error.

Exception No. 2.

His Honor declined to hold that the enforcement of the assessment against the Durham Traction Company was the taking of
47 property without due process of the law. The Durham Traction Company excepted to this ruling and assigns same as error.

Exception No. 3.

Upon the foregoing finding of facts the court ruled against the Traction Company and the defendant excepted and assigns same as error.

Exception No. 4.

The court after hearing the argument of counsel adjudged upon the foregoing facts found by it and the facts admitted in the pleadings as follows:

It is considered and adjudged by the court that the action of the board of aldermen on the 16th day of November, 1920, in adopting the resolution or ordinance confirming the assessment roll wherein the Durham Public Service Company was assessed the sum of $102,912.30, did not impair the obligation of any contract nor was the obligation of any contract impaired by the said ordinance and that the said City of Durham had the power and authority to assess against said company the cost of the said improvement where the tracks were single for the entire width between the rails, the width of the rails and eighteen inches on the outside of the tracks, and where the tracks were double for the space between the tracks, between the rails, the width of the rails and eighteen inches on the outside of the tracks.

And it is further adjudged that the City of Durham recover of the Durham Traction Company the sum of one hundred and two thousand, nine hundred, forty two and 30/100 dollars with interest thereon from the 16th day of November, 1920, payable in cash, or in installments as provided for in Consolidated Statutes, Section 2716.

W. A. DEVIN,
Judge Presiding.

48 To the signing of the foregoing judgment the defendant excepts and assigns the same as error.

Exception No. 5.

To the foregoing judgment the defendant excepted and assigned the same as error.

Exception No. 6.

In open court the Durham Traction Company gave notice of appeal to the supreme court. Further notice waived. Appeal bond fixed at $50. It is agreed that the complaint, answer, exhibits, finding of facts and judgment thereon shall constitute the case on appeal.

W. A. DEVIN,
Judge Presiding.

Exceptions Grouped.

NORTH CAROLINA,
Durham County:

In the Superior Court.

CITY OF DURHAM

vs.

DURHAM PUBLIC SERVICE COMPANY.

The defendant groups its exceptions and assignment of error as follows:

Exception No. 1. (Page 46).

Because His Honor declined to hold that the ordinance of February 4, 1901, prevented the City of Durham from making assessment against Durham Traction Company for the paving of
49 Main Street of said city, the street on which the street car company operated its lines under said ordinance of February 4, 1901.

Exception No. 2 (Page 46).

Because His Honor declined to hold that the assessment was arbitrary or unjust or oppressive.

Exception No. 3 (Page 46).

Because His Honor declined to hold that the enforcement of the assessment against the Durham Traction Company was the taking of property without due process of law.

Exception No. 4 (Page 47).

Because upon the finding of facts the court ruled against the Traction Company.

Exception No. 5 (Page 47).

Because His Honor signed the judgment as set out in the record

Exception No. 6 (Page 48).

The defendant excepted to the judgment as set out in the record and assigns the same as error.

W. L. FOUSHEE.
J. S. MANNING.
W. J. BROGDEN.
Attorneys for Defendant.

50 *Bond.*

NORTH CAROLINA,
Durham County:

In the Superior Court.

CITY OF DURHAM

vs.

DURHAM PUBLIC SERVICE COMPANY.

Whereas, in the above entitled action judgment was rendered at the June term, 1921, of the superior court of Durham County, in favor of plaintiff against the defendant, from which judgment the defendant appealed to the Supreme Court of North Carolina, and appeal bond was fixed by His Honor, W. A. Devin, in the sum of $50 as appears on record; and whereas, defendant has appealed from said judgment to the supreme court.

Now, therefore, we, the undersigned, Durham Public Service Company, as principal, and A. W. Grady as surety, undertake in the sum of $50 to pay plaintiff all such costs as may be adjudged against us by the supreme court of North Carolina, by reason of said appeal not to exceed the sum of $50.

This 4th day of October, 1921.

DURHAM PUBLIC SERVICE CO. [SEAL.]
By A. W. GRADY.
A. W. GRADY.

51 A. W. Grady, being duly sworn, says that he is worth the sum of $100 over and above his liabilities and exemptions allowed by law.

A. W. GRADY.

Sworn to and subscribed before me this 4th day of October, 1921.

W. C. LINDSEY,
Notary Public.

Approved:

_____,
Clerk Superior Court.

52 *Clerk's Certificate.*

NORTH CAROLINA,
Durham County:

I, W. H. Young, Clerk of Superior Court in and for the County of Durham, State of North Carolina, do hereby certify that the foregoing and attached pages constitute a true, accurate and perfect copy of the record and case on appeal in the case entitled "City of Durham vs. Durham Traction Company" as the same is taken from and compared with the original now on file in this office.

Witness my hand and official seal this the — day of October, 1921.

W. H. YOUNG,
Clerk of Superior Court.

53 *Docket Entries.*

Appeal docketed 11 October 1921; case argued 18 October 1921; opinion filed 2 November 1921 as follows:

54 Supreme Court of North Carolina, Fall Term, 1921.

#335.

CITY OF DURHAM,

v.

DURHAM PUBLIC SERVICE COMPANY.

Durham.

Civil Action Tried Before His Honor W. A. Devin, Judge, at Spring Term, 1921, of the Superior Court of Durham County, a Trial by Jury Having Been Waived by the Parties.

The action is to recover the sum of $102,942.30, assessed against the defendant company for its proportion of the cost of paving the Main Street of said city on which the tracks of defendant, a street railway, are laid. Defendant having refused to make the improvement as required by a city ordinance, the work was done by the city and assessed against the company as the Statute provides. There is no claim but that the proceedings were formally correct, but defendant resists recovery on the ground that the company is pro-

tected by a clause in the license or permit under which its tracks were laid, and which amounts to a contract on the part of the city that the costs of such an improvement shall not be imposed upon the company. Second, that the width of the improvement is in excess of the amount allowed by the statute.

There was judgment for plaintiff, and the defendant excepted and appealed.

S. C. Chambers, Fuller, Reade & Fuller, for Plaintiff.
J. S. Manning, W. L. Foushee, W. J. Brogden, for Defendant.

HOKE, *Judge:*

The charter of the Durham Traction Company, under which defendant holds and is operating the street railway, (Private Laws 1901, Chapter 25, Section 2) contains the provision, "That said company may construct and operate railway lines upon and along the streets of said city, permission being first had from the Board of Aldermen, &c." And the ordinance of the city by which the permit or license was given, after conferring the privilege and designating the routes over which the tracks may be laid, &c., is in part as follows:

"As soon as the said tracks are completed and the poles, wires and appliances are erected and placed, the portions of the streets and avenues that may have been used for these purposes shall be repaired and restored at said company's cost and expense to their former condition so far as they may have been damaged by the placing and erecting of the tracks, poles, wires, and appliances. The said Durham Traction Company in laying its track upon the route herein described, on, over and along the streetss and avenues, shall follow the grade to be designated by the Street Commissioner, and it shall be his duty upon the application of said Durham Traction Company to furnish it with grades. The said Durham Traction Company whenever it shall be required so to do, shall cause its roadbed and track to be brought to surface grade at its own expense and costs, but nothing herein contained shall be construed to require said Durham Traction Company to pave its roadbed, but it shall be required to restore its roadbed to the conditions in which it was at the time of laying of said track, provided, however, that if the city decides to put in or change its sewerage pipes on any of the streets of the said city on which the tracks of said Durham Traction Company may be laid, the said city may require the said Traction Company to remove and replace, at its own expense, the said tracks, for said purpose and said city shall incur no liability for any delays or interruptions of the business or traffic of said Traction company, caused thereby."

And in the act of the Legislature more directly pertinent which authorized the imposition of these assessments for local improvements, and in the portion appertaining to street railways, &c., Con-

solidated Statutes, Section 2708, it is provided, "That when any such company shall occupy such street or streets under a franchise or contract which otherwise provides such franchise or contract, shall not be affected by this Section except in so far as may be consistent with the provisions of such franchise or contract." And it is earnestly contended for the appellant that this clause in the ordinance referred to, fully recognized in the legislative proviso amounts to a contract stipulation protecting the defendant Company at all times from any charge for paving the streets and that the burden here imposed upon it is without warrant of law, but in our opinion and on the facts presented, the position may not be sustained.

It is fully established that the Legislature, either directly or through its recognized governmental agencies may impose assessments for these local improvements. City of Raleigh v.
56 Carolina Power & Light Co., 180 N. C. p. 234; Felmet v. Canton, 177 N. C. p. 52; Justice v. Asheville, 161 N. C. p. 62; Tarboro v. Staton, 156 N. C. pp. 501-509; Kinston v. Wooten, 150 N. C. p. 295; Asheville v. Trust Co., 143 N. C. p. 460; Raleigh v. Peace, 110 N. C. p. 32; Milwaukee &c. R. R. v. State of Wisconsin, &c., 252 U. S. p. 100; French v. Barber & Co., 181 U. S. 324.

And it is very generally held that the property and franchise of street railways laid along a given street or in a designated locality within the effects and benefits of the proposed improvements may be lawfully brought within the principle as abutting owners. City of New Bern v. A. & N. C. R. R., 159 N. C. p. 542; Commissioners of Chatham v. S. A. L. R. R., 133 N. C. p. 216; Cicero R. R. v. City of Chicago, 176 Ill., p. 501.

The power to impose these assessments for local improvements is properly referred to the sovereign power of taxation and it is the accepted principle of interpretation that no license, permit or franchise from a municipal board or from the Legislature itself will be construed as establishing an exemption from the proper exercise of this power, or in derogation of it, unless these bodies are acting clearly within their authority and the grant itself is in terms so explicit as to be free from any substantial doubt. R. R. v. Alsbrook, 110 N. C. p. 137, affirmed on writ of error in 146 U. S. p. 279; Cleveland Electric R. R. v. City of Cleveland, 204 U. S. p. 116; Lincoln Street Railway v. City of Lincoln, 61 Neb. p. 109; Sioux City Street Railway v. Sioux City, 78 Iowa, affirmed on writ of error 138 U. S. p. 98; Railway Co. v. Philadelphia, 101 U. S. p. 528.

In Alsbrook's case, it was held: "The power of taxation being essential to the life of government, exemptions therefrom are regarded as in derogation of sovereign authority and common right and will never be presumed.

2. The grant of an exemption from taxation must be expressed by words too plain to be mistaken. If a doubt arise as to the intent of the Legislature, the doubt must be resolved in favor of the State."

And in Cleveland v. Electric Railway Co., 204 U. S., Grants of franchises are usually prepared by those interested in them and submitted to the Legislature with a view to obtain the most liberal grant

obtainable and for this and other reasons, such grants should
57 be in plain language, certain, definite in their nature and containing no ambiguity in their terms, and should be strictly construed against the grantee.

Under a proper application of these decisions and the principles they approve and illustrate, there is nothing in the ordinance that contains the exemptions contended for by the company. The terms relied upon for the purpose appear in the second section of the ordinance in the immediate connection with the provision *the* "The said Durham Traction Company wherever it shall be required to do so shall cause its roadbed and track to be brought to surface grade at its own expense and cost but nothing herein contained shall be construed to require said Durham Traction Company to pave its roadbed, but it shall be required to restore its roadbed to the conditions in which it was at the time of laying the track, &c." The ordinance is dealing and intends to deal only with the things there required and under conditions then existing. There is nothing that purports to affect the future, nor which could prevent the city government under more advanced conditions in the exercise of the powers conferred upon it for the public good from enacting ordinances that its streets be paved and that this railway as an abutting owner should bear its proper proportion of the cost. Several of the authorities already referred to are in direct approval of the position. City of New Bern v. R. R. 159 N. C. p. 542; Sioux City Railway v. Sioux City, 138 U. S. p. 98; Railway Co. v. Philadelphia, 101 U. S. p. 528, and numerous others could be cited.

We are confirmed in this view, if confirmation were needed, by the fact that there is grave doubt if either Legislature or city government in abdication of the police powers conferred upon them for the public good could enter into a valid contract binding on their successors that never under any circumstances and regardless of changing conditions could any future city government order that its streets be paved and the railway company as abutting owner bear its proportion of the costs. Powell v. R. R. Co., 178 N. C. p. 243; R. R. v. Goldsboro, 155 N. C. p. 356, affirmed on writ of error, 232 U. S. p. 548. In case of ambiguity permitting construction, the courts will lean against an interpretation that threatens the constitutionality of a statute. Black's Interpretation of Laws (2nd Edition) p. 110.

It is further insisted for the appellant that the assessment is invalid because the same is excessive in amount and discriminative as
between this company and other abutting owners, but in our
58 opinion the facts in evidence do not support the objection.

It is fully established that in the imposition of these assessments, both the necessity of the proposed improvement and its apportionment are very largely in the discretion of the Legislature, and its subordinate agencies in charge and control of the matter. Speaking to the question in Felmet v. Canton, supra, the Court held:

"The authority conferred by statute on municipal corporations to assess lands abutting upon the streets for public local purposes comes within the power of taxation and is largely a matter of legislative

discretion, usually held to be conclusive as to the necessity of the improvement, and in respect to the apportionment and the amount only becomes a judicial question in cases of palpable and gross abuse."

Tarboro v. Staton, 156 N. C. p. 509; Kinston v. Wooten, 150 N. C. p. 295, and authority generally on the subject is to the same effect. True, the Court finds that the value of the property on this main street is only $100,000.00, but this is the objective or tangible property, constituting the 2.02 miles of trackage on that street and contains no estimate of the value of the company's franchise under which it is operating, and which by fair apportionment must be included in the estimate. The only data presented on that subject is that the net earnings of the company for the year ending December 31, 1920, was $147,000.00 from this and other activities under the franchise. There is a further finding to the effect that for the year ending May 31, 1921, the operation of defendant's railway showed a loss of $17,388.73. Whether this results by reason of exceptional costs and charges accruing during that period does not definitely appear but there is a presumption against error and under the principles referred to as controlling and approved in the cases cited, the facts presented are entirely insufficient to justify the Court in upsetting the action of the municipal authorities having charge of the assessment and this exception must be overruled.

Again, appellant objects, contending that the width of the pavement charged against them exceeds the amount allowed by the statute under which the city government proceeded, the limitation being that the burden imposed shall not exceed "the space between the tracks, the rails of the tracks, and eighten inches in width outside of the tracks of such company." Consolidated Statutes, Section 2708. The Court finds that the width of assessment where the track is single is eight feet and the cross ties of company are
59 seven feet and ten inches, so that if the language and meaning of the statute "eighteen inches outside of the tracks of the company" by correct interpretation include the rails and the cross ties, the width of the paving imposed upon the company is well within the statutory provision. The term "railroad tracks" in several dictionaries is defined to include both the rails and the cross ties upon which they are placed, and to extend even to the roadbed. This definition has been approved in authoritative cases dealing with the subject. Bird v. Common Council, 148 Mich. p. 71; Gates v. Chicago R. R., 82 Iowa, p. 518, and in cases of this character, there is every reason to include the cross ties as coming within the meaning of the term.

The form of the judgment allowing payment by installments is expressly provided for in the statute, Consolidated Statutes, Section 2716.

On careful consideration, we find no reversible error and the judgment of the Superior Court is affirmed.

Affirmed.

60 Supreme Court of North Carolina, Fall Term, 1921.

#335.

CITY OF DURHAM

vs.

DURHAM PUBLIC SERVICE CO.

Durham Co.

Judgment.

This cause came on to be argued upon the transcript of the record from the Superior Court of Durham County: Upon consideration whereof, this Court is of opinion that there is no error in the record and proceedings of said Superior Court.

It is therefore considered and adjudged by the Court here that the opinion of the Court, as delivered by the Honorable W. A. Hoke, Justice, be certified to the said Superior Court, to the intent that the judgment be affirmed.

And it is considered and adjudged further, that the defendant and surety do pay the costs of the appeal in this Court incurred, to wit, the sum of Thirty-eight 25 100 ($38.25) dollars, and execution issue therefor

61 *Petition for Writ of Error.*

CITY OF DURHAM

vs.

DURHAM PUBLIC SERVICE COMPANY.

To the Honorable Walter Clark,
Chief Justice of the Supreme Court of North Carolina:

The Durham Public Service Company, defendant in the above entitled cause, shows by this Petition to this Honorable Court, that in the records, proceedings and decisions in the Supreme Court of the State of North Carolina, the same being the highest court in said State in which a decision could be had in this suit, manifest errors have occurred, greatly to the damage of the said Durham Public Service Company.

That, as appears in the record and proceedings, there was drawn in question the question as to whether or not an ordinance of the plaintiff City of Durham, under which ordinance the said City of Durham undertook to impose an assessment of $102,942.30 against the defendant Company for its construction of the paving of the main street of said City of Durham on which the tracks of the defendant Durham Public Service Company, a street railway, are laid, was

valid. The defendant having refused to make the improvements as required by the said ordinance of said City, the work was done by the City and assessed against the Company, as is provided by Section 2708 of the Consolidated Statutes of North Carolina, it being Section 6, Chapter 56 of the Public Laws of said State, 1915, and being as follows:

"1. The preliminary resolution determining to make a local improvement shall after its passage be published. Such resolution shall designate by a general description the improvement to be made and the street or streets, or part or parts thereof whereon the work is to be effected, and the proportion of the cost thereof to be assessed upon abutting property and the terms and manner of payment.

62 2. If such resolution shall provide for a sidewalk improvement, it may, in those municipalities in which the owners of the abutting property are required to make payment of the entire cost thereof, without petition direct that the owners of the property abutting on the improvement shall make such sidewalk improvement, and that unless the same shall be made by such owners on or before a day specified in the resolution, the governing body may cause such sidewalk improvement to be made.

3. If the resolution shall provide for the street improvement, it shall direct that any street railway company or other railroad company having tracks on the street or streets or part thereof to be improved shall make such street improvement, with such material and of such a character as may be approved by the governing body, in that part of such street or streets or part thereof which the governing body may prescribe, not to exceed, however, the space between the tracks, the rails of the tracks, and eighteen inches in width outside of the tracks of said Company, and that unless such improvement shall be made on or before a day specified in said resolution, the governing body shall cause such improvement to be made: Provided, however, that where any such company shall occupy such street or streets under a franchise or contract which otherwise provided, such franchise or contract shall not be affected by this section except in so far as may be consistent with the provisions of such franchise or contract."

That the defendant Durham Public Service Company, formerly the Durham Traction Company, was incorporated under a charter granted to it by the Legislature of North Carolina at its session in 1901, being Private Laws, Chapter 25, and Section 2 of said Chapter is as follows:

"That said Company shall be, and it is hereby empowered and authorized to promote, establish, conduct, and maintain the business of a general street railway, light and power company, to locate, lay, lease, construct, erect, establish, equip, maintain, operate, own or sell, or otherwise acquire or dispose of, a line or lines of street railway or railways, and a plant or plants, works or other necessary

equipment for the generation of electricity, gas, or other materials or fluids, and supply the same for public or private use for light power and heat within the limits of the City of Durham and within the limits of the County of Durham as the same are now or may be hereafter laid off, as may be determined upon from time to time by said Company, and over the bridges, across any river, creek or stream within said City or County. The said company may locate lay, erect, construct, equip, maintain and operate a line or lines of street railway and its poles, wires, subways, conduits, pipes, mains and other fixtures and appliances necessary for the proper, full and convenient carrying on of the business of said Company in, over and along the roads, avenues, lanes, alleys and other public high-
ways in the said City and County; permission being first
63 had from the Board of Aldermen of the City of Durham for work authorized to be done hereunder within the limits of the said City, and permission being first had from the Board of Commissioners of the County of Durham for work to be done here under within the limits of said County and outside of the corporate limits of the City of Durham, the said charter having been ratified on the 29th day of January, 1901."

That the said City of Durham on the 4th day of February, 1901 enacted an ordinance and entered into a contract with the Durham Traction Company by which it gave, granted and conveyed to the Durham Traction Company, its successors and assigns, the right privilege and franchise to locate, construct, operate and maintain a street railway with a single or double tracks as may be decided best by its directors, with all necessary switches, cross-overs and turn-outs within the limits of the City of Durham for the carrying of passengers and freight under and subject to the conditions, privileges and limitations set forth in said contract, on the streets therein named; and in said second paragraph of said contract, ordinance or franchise provided

"As soon as the said tracks are completed and the poles, wires and appliances are erected and placed, the portions of the streets and avenues that may have been used for these purposes shall be repaired and restored at said Company's cost and expense, to their former condition so far as they may have been damaged by the placing and erecting of the tracks, poles, wires and appliances. The Durham Traction Company, in laying its track upon the route herein described on, over and along the streets and avenues, shall follow the grades to be designated by the street commissioner and it shall be his duty upon application of the said Durham Traction Company to furnish it with grades. The Durham Traction Company, whenever it shall be required so to do, shall cause its road-bed and track to be brought to surface grade at its own expense and cost, but nothing herein contained shall be construed to require said Durham Traction Company to pave its road-bed, but it shall be required to restore its road-bed to the conditions in which it was at the time of laying said track: provided, however, that if the City decides to

put in or change its sewerage pipes on any of the streets of said City on which the tracks of the said Durham Traction Company may be laid, the said City may require the said Traction Company to remove and replace at its own expense the said tracks for said purpose, and said City shall incur no liability for any delays or interruptions of the business or traffic of said Traction Company caused thereby."

(*a*) Whether said ordinance assessing the property of the defendant Durham Public Service Company was or was not in conflict with and in contravention of Article I, Section 10, Clause 3,
61 of the Constitution of the United States of America, as follows:

"No state shall * * * pass any law impairing the obligations of contracts."

(*b*) And further in conflict with and in contravention of Article V and Article XIV of the Constitution of the United States of America, in that the said defendant Durham Public Service Company is denied the equal protection of the laws of the said State, and that it is deprived of its property without due process of law.

(*c*) That the said assessment is invalid, is arbitrary, oppressive, and discriminatory against the said defendant Durham Public Service Company.

(*d*) For it was not within the power of the City of Durham by its ordinance or the State of North Carolina to enact the said ordinance, assessing the property of the defendant Durham Public Service Company for the cost of paving its said road-bed; all of which fully appears in the records and proceedings of the case and is specifically set forth in the Assignments of Error filed herewith.

Wherefore, petitioner prays that a Writ of Error be allowed and that a transcript of record, proceedings and papers upon which said appeal was rendered, duly authenticated, be ordered sent to the Supreme Court of the United States of Washington, D. C. under the rules of such Court in such cases made and provided, and that the same be by the Honorable Court inspected and corrected in accordance with law and justice.

JAMES S. MANNING,
WM. L. FOUSHEE,
Solicitors.

65 [Endorsed:] City of Durham vs. Durham Public Service Company. Petition. J. S. Manning, Attorney and Counselor-at-Law, Fourth Floor, Citizens National Bank Building, Raleigh, N. C. Manning & Kitchin, Raleigh, N. C.

66

Writ of Error and Order.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Walter Clark, Chief Justice of the Supreme Court of North Carolina, and to the Associate Justices of the Court, Greeting:

Whereas, in the record and proceedings and in the rendition of the judgment of the above entitled cause, which said cause was before us at the Fall Term of the Supreme Court of North Carolina, between the City of Durham and the Durham Public Service Company, this Court being the highest Court of the State of North Carolina for jurisdiction of the cause, there was drawn in question Article I, Section 10, Clause 1 of the Constitution of the United States of America forbidding a state to pass any law impairing the obligations of contracts; Article V and Article XIV of the Constitution of the United States of America forbidding the taking of property without due process of law, and guaranteeing equal protection of law to all the people called the citizens of the state, all of which fully appears in the records and proceedings of the case and is specifically set forth in the assignments of error filed herewith.

And whereas, there has been filed a Petition for Writ of Error in said decision to the damage of the Durham Public Service Company, the Petitioner in error; and whereas, we are willing that if there is error, it should be duly corrected.

Therefore, on motion of J. S. Manning, and W. L. Foushee, attorneys for the above named defendant, it is hereby ordered that a Writ of Error be allowed upon bond being furnished by the defendant, conditioned according to law in the sum of Five Hundred ($500.00) Dollars, and that a true copy of the record, assignments of error and all proceedings in the case of the Supreme Court of North Carolina shall be transmitted to the Supreme Court of
67 the United States, duly certified according to law, in order that said Court may inspect the same and take such action as it deems proper according to law.

It further appearing that in the Court below such proceedings were had as by consent the defendant in order to have its property relieved of the execution in behalf of the plaintiff, entered into a good and sufficient bond in the sum of Fifteen Thousand ($15,000.00) Dollars, with Maryland Casualty Company as surety, conditioned as required by law to abide by the final decree in this cause and faithfully pay the amount adjudged to be due the plaintiff, and further perform the said judgment as may be awarded in said decree, it is ordered that the bond so given be regarded as the supersedeas bond in this cause and that no other or further supersedeas bond be required.

Witness the Honorable William H. Taft, Chief Justice of the Supreme Court of the United States, the 16 day of January, 1922.

[Seal of the United States District Court, Eastern Dist. of N. C., at Raleigh.]

S. A. ASHE,
Clerk United States District Court for the Eastern District of North Carolina.

WALTER CLARK,
Chief Justice of the Supreme Court of North Carolina.

16 day of Jan., 1922.

Filed in Supreme Court of North Carolina, 16 Jan., 1922.
J. L. SEAWELL,
Clerk Supreme Court of North Carolina.

68 [Endorsed:] City of Durham vs. Durham Public Service Company. Writ of Error. J. S. Manning, Attorney and Counselor-at-Law, Fourth Floor Citizens National Bank Building, Raleigh, N. C. Manning & Kitchin, Raleigh, N. C.

69 CITY OF DURHAM

vs.

DURHAM PUBLIC SERVICE COMPANY.

Assignments of Error.

Now comes the defendant in the above entitled cause and files the following assignments of error upon which they will rely upon their prosecution of the appeal in the above entitled cause from the decree made by this Honorable Court on the 2 day of November, 1921.

I.

For that the Supreme Court of the State of North Carolina erred as follows: in holding that the ordinance of the City of Durham enacted pursuant to Consolidated Statutes, Section 2708, (Public Laws of the State of North Carolina, 1915, Section 6, Chapter 56) did not impair the obligations of the contract between the City of Durham and the Durham Traction Company, predecessor of the Durham Public Service Company, and the same was invalid and in contravention of Article I, Section 10, Clause 1 of the Constitution of the United States of America.

II.

In holding that the said paving ordinance and act of the Legislature was not illegal and void and in contravention of Articles

V and XIV of the Constitution of the United States of America, and in not holding that the said ordinance and statute of North Carolina denied to the defendant the equal protection of its laws and was the taking of defendant's property without due process of law and was illegal, arbitrary and oppressive, and discriminatory.

III.

In not holding that the said City of Durham had no power to impair the obligations of its contract with the defendant and its ordinance was void, and the assessment illegal.

IV.

In not holding that the ordinance and contract between the City of Durham and the Durham Traction Company dated
70 February 4, 1901 constituted a contract between the said City of Durham and the Durham Traction Company and its successors and assigns for the term prescribed therein and under which the said Durham Traction Company and its successors, the Durham Public Service Company, could not be required to pave its road-bed.

V.

In rendering and in signing the judgment and opinion set out in the record.

Wherefore, the appellant prays that the said appeal be reversed and that the said Supreme Court of the State of North Carolina be ordered to enter a decree reversing the decision of the lower court in said cause.

JAMES S. MANNING,
WM. L. FOUSHEE,
Attorneys for Appellant.

71 [Endorsed:] City of Durham vs. Durham Public Service Company. Assignments of Error. J. S. Manning, Attorney and Counselor-at-Law, Fourth Floor Citizens National Bank Building, Raleigh, N. C. Manning & Kitchin, Raleigh, N. C.

72 *Bond of Appeal.*

CITY OF DURHAM

vs.

DURHAM PUBLIC SERVICE COMPANY.

Know all men by these presents:

That we, Durham Public Service Company, of the County of Durham and State of North Carolina, as principal, and Maryland Cas-

ualty Company, authorized to do business in the State of North Carolina and doing business in said State, are held and firmly bound unto the City of Durham, Durham County, North Carolina, in the sum of Five Hundred ($500.00) Dollars lawful money of the United States to be paid to it, to which payment well and truly to be made we bind ourselves and each of us jointly and severally, and each of our successors, by these presents.

Signed with our seal and dated this 17 day of December, 1921.

Whereas, the above named Durham Public Service Company has prosecuted a Writ of Error to the Supreme Court of the United States to reverse the judgment of the Supreme Court of North Carolina in the above entitled cause;

Now, therefore, the condition of this obligation is such that if the above named Durham Public Service Company shall prosecute its said appeal to effect and answer all costs if it fail to make good its plea, then this obligation shall be null and void, otherwise, shall remain in full force and effect.

DURHAM PUBLIC SERVICE COMPANY,
By A. W. GRADY,
Secretary.

[SEAL.] MARYLAND CASUALTY COMPANY,
By W. C. LINDSEY,
Attorney in Fact.

Countersigned by
W. FOUSHEE,
Attorney in Fact.

The foregoing bond is approved. This 16 day of January, 1922.
WALTER CLARK,
Chief Justice of the Supreme Court of North Carolina.

73 [Endorsed:] City of Durham vs. Durham Public Service Company. Bond. J. S. Manning, Attorney and Counselor-at Law, Fourth Floor Citizens National Bank Building, Raleigh, N. C. Manning & Kitchin, Raleigh, N. C.

74 STATE OF NORTH CAROLINA:

CITY OF DURHAM

vs.

DURHAM PUBLIC SERVICE COMPANY.

Stipulation.

It is stipulated and agreed that the bond executed by the Durham Public Service Company by R. L. Lindsey, Vice-President under the seal attested by the Secretary on which Maryland Casualty Company is surety, the same being in the sum of $15,000.00, by which the Durham Public Service Company undertakes in the said sum of $15,-

000.00 to pay the City of Durham the judgment secured in the above entitled action in the event that the Writ of Error applied for to the Supreme Court of the United States shall be dismissed by the Supreme Court of the United States or in the event that said Supreme Court of the United States shall adjudge that the Durham Public Service Company is liable for the amount of said judgment together with interest, the same being in the nature of a supersedeas bond, is accepted and approved this 14th day of January, 1922.

THE CITY OF DURHAM,
By S. C. CHAMBERS,
FULLER, READE & FULLER,
JONES FULLER,
Attorneys.

75 *Citation.*

CITY OF DURHAM

vs.

DURHAM PUBLIC SERVICE COMPANY.

To the City of Durham, Durham, N. C., Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held in the City of Washington, District of Columbia on the 16th day of February, 1922, pursuant to an order allowing a Writ of Error entered in the Clerk's office of the Supreme Court of North Carolina from a final decree filed and entered on the 2nd day of November, 1921 in that certain suit wherein the Durham Public Service Company is the defendant and appellant, and you are the plaintiff and the appellee, to show cause, if any there be, why the decree rendered against the said appellant as in said order allowing the appeal mentioned, should not be given, and why justice should not be done to the parties in that behalf.

Witness, The Honorable Walter Clark, Chief Justice of the Supreme Court of North Carolina, this 16 day of January, 1922.

WALTER CLARK.

Service of the within Citation accepted, and service by an officer expressly waived. This 17th day of January, 1922.

S. C. CHAMBERS,
JONES FULLER,
Attorneys for the City of Durham.

76 [Endorsed:] City of Durham vs. Durham Public Service Company. Citation. J. S. Manning, Attorney and Counselor-at-Law, Fourth Floor Citizens National Bank Building, Raleigh N. C. Manning & Kitchin, Raleigh, N. C.

77 Supreme Court of North Carolina.

I, J. L. Seawell, Clerk of the Supreme Court of North Carolina, do hereby certify the foregoing to be a full, true and correct copy of the proceedings in this Court, entitled "City of Durham vs. Durham Public Service Company" as appear from originals on file in my office.

Witness my hand and seal of said Court at office in Raleigh, this January 16, 1922.

[Seal of the Supreme Court of the State of North Carolina.]

J. L. SEAWELL,
Clerk of the Supreme Court of North Carolina.

Endorsed on cover: File No. 28,654. North Carolina Supreme Court. Term No. 699. Durham Public Service Company, plaintiff in error, vs. The City of Durham. Filed January 18th, 1922. File No. 28,654.

(5675)

Office Supreme Court, U. S.
FILED
JAN 11 1923
WM. R. STANSBURY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 251.

DURHAM PUBLIC SERVICE COMPANY, PLAINTIFF IN ERROR,

vs.

CITY OF DURHAM, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

BRIEF IN BEHALF OF PLAINTIFF IN ERROR.

JAMES S. MANNING,
W. L. FOUSHEE,
JOHN H. MANNING,
Counsel for Plaintiff in Error.

INDEX.

	Page.
Statement of facts	1
Summary of questions involved	11
Argument	14
An ordinance is a law	14
Determination of State court not conclusive on this court.	14
City of Durham was authorized to contract	15
No power to amend or repeal is reserved	18
Legislature did not exercise reserve power	18
Provisions of contract and meaning	22
Assessment cannot be justified as valid exercise of police power	27
Instances in which police power has been exercised	28
The contract is not contrary to public policy	31
Exercise of police power in legislature	31
Assessment is arbitrary, unreasonable, oppressive, and discriminatory	33
Chapter 56, Laws 1915, Appendix A	38

CASES CITED.

A.

Asheville vs. Trust Co., 143 N. C., 360; 55 S. E., 800	21
Austin vs. Tennessee, 179 U. S., 347; 45 L. Ed., 327	29
Atlantic Coast L. R. Co. vs. Goldsboro, 232 U. S., 558; 58 L. Ed., 726	29

B.

Bacon vs. Texas, 163 U. S., 207; 41 L. Ed., 132	15
Blair vs. Chicago, 201 U. S., 400; 50 L. Ed., 801	17
Burgin vs. Smith, 151 N. C., 588; 66 S. E., 569	20
Butchers Union S. H. & L. S. Co. vs. Crescent City L. S. & S. H. Co., 111 U. S., 746; 28 L. Ed., 585	29
Boston Beer Co. vs. Mass., 97 U. S., 33; 24 L. Ed., 992	29

C.

Chicago, B. & Q. R. Co. vs. Nebraska, 170 U. S., 57; 42 L. Ed., 948	15, 18, 29, 31
Cleveland vs. Cleveland City R. Co., 194 U. S., 517; 48 L. Ed., 1102	17

Page.

Columbus Ry. P. & L. Co. vs. Columbus, 249 U. S., 399; 63 L. Ed., 669 ..... 17, 18
Covington vs. Commonwealth of Kentucky, 173 U. S., 239; 43 L. Ed., 679 18
Citizens Sav. Bank vs. Owensboro, 173 U. S., 239; 43 L. Ed., 840 18
Comrs. vs. Webb, 160 N. C., 594; 76 S. E., 552 22
Comrs. vs. Davis, 182 N. C., 140; 102 S. E., 506 22
Chicago M. & St. P. R. Co. vs. Minneapolis, 232 U. S., 430; 58 L. Ed., 671 29
Chicago vs. Sheldon, 76 U. S., 50; 19 L. Ed., 594 31

D.

Davis & F. Mfg. Co. vs. Los Angeles, 189 U. S., 207; 47 L. Ed., 778 14
Douglas vs. Kentucky, 168 U. S., 488; 42 L. Ed., 553 15
Detroit vs. Detroit Citizens Street R. Co., 184 U. S., 368; 46 L. Ed., 592 17
Detroit United Railway vs. Michigan, 242 U. S., 238; 61 L. Ed., 268 ..... 17, 30
Denver & Rio Grande R. Co. vs. Denver, 250 U. S., 241; 63 L. Ed., 958 30
Detroit Elevated Railway vs. Michigan, 242 U. S., 238; 61 L. Ed., 268 30

E.

Enid City Ry. Co. vs. City of Enid, 43 Okla., 785; 144 Pac., 620. 31

F.

Felmet vs. Canton, 177 N. C., 52; 97 S. E., 728 22
Funkhauser vs. Sphor, 102 Va., 306 (310) 26
Foster vs. Kansas, 112 U. S., 206; 28 L. Ed., 697 29
French vs. Barber Asphalt Paving Co., 181 U. S., 324; 45 L. Ed., 879 34
F. S. Royster Guano Co. vs. Virginia, 253 U S., 412; 64 L. Ed., 989 36

G.

Grand Trunk, etc., R. Co. vs. South Bend, 227 U. S., 544; 57 L. Ed., 633 ..... 15, 17, 30
Great Northern R. Co. vs. Minnesota, 246 U. S., 434; 62 L. Ed., 817 29

Page.

Gast Realty & Invest. Co. vs. Schneider Granite Co., 240 U. S., 55; 60 L. Ed., 523 35

H.

Hancock vs. Muskogee, 250 U. S., 454; 63 L. Ed., 1081 35

J.

Jefferson Branch Bank vs. Skelly, 66 U. S., 436; 17 L. Ed., 173. 15
Jacobson vs. Mass., 197 U. S., 31; 49 L. Ed, 652 29

K.

Knoxville Water Co. vs. Knoxville, 189 U. S., 434; 47 L. Ed., 887 17
Kinston vs. Wooten, 150 N. C., 295; 63 S. E., 1061 22
Kennebec & Portland R. Co. vs. Portland & Kennebec R. Co., 59 Me., 9 (61) 26
Kansas City S. R. Co. vs. Road Imp. Dist. No. 6, 256 U. S., 658; 65 L. Ed., 1151 ..... 35, 36

L.

Louisville Gas. Co. vs. Citizens Gas. Co., 115 U. S., 683; 29 L. Ed., 510 15
Louisville vs. Cumberland T. & T. Co., 224 U. S., 649; 56 L. Ed., 934 ..... 17, 18
Lilly vs. Taylor, 88 N. C., 490 19
Lutterloh vs. Fayetteville, 149 N. C., 65; 62 S. E., 758 20
Lockner vs. New York, 198 U. S., 53; 49 L. Ed., 940 29

M.

Mercantile Trust & Dep. Co. vs. Columbus, 203 U. S., 311; 51 L. Ed., 198 14
Marion vs. Pilot Mountain, 170 N. C., 118; 87 S. E., 53 22
Mugler vs. Kansas, 123 U. S., 623; 31 L. Ed., 205 29
Milwaukee E. R. & L. Co. vs. Wisconsin, 252 U. S., 100; 64 L. Ed., 476 30
Madison vs. Sou. Wis. Ry. Co., 156 Wis., 373; 146 N. W., 500 31

N.

Page.

Northern Pacific R. R. Co. vs. Duluth, 208 U. S., 583; 52 L. Ed., 630 ..... 14, 29
Northern Pacific R. R. Co. vs. Minnesota, 208 U. S., 590; 52 L. Ed., 633 15
N. Y. Electric Lines Co. vs. Empire City Subway Co., 235 U. S., 186; 59 L. Ed., 189 15
New Bern vs. R. R., 159 N. C., 542; 75 S. E., 807 17
Note—46 L. R. A., 196 27
New Orleans Gas Light Co. vs. Louisiana Light, etc., Mfg. Co., 115 U. S., 650; 29 L. Ed., 516 28
Northwestern Fert. Co. vs. Hyde Park, 97 U. S., 659; 24 L. Ed., 1036 29
New Orleans Gas L. Co. vs. Drainage Comrs., 197 U. S., 453; 49 L. Ed., 831 29
New York and N. E. R. Co. vs. Bristol, 151 U. S., 556; 38 L. Ed., 269 29
Norfolk, etc., Traction Co. vs. City of Norfolk, 115 Va., 172; 78 S. E., 546 31
Norwood vs. Baker, 172 U. S., 269; 43 L. Ed., 443 31

O.

Oklahoma R. Co. vs. Severns Pav. Co., 251 U. S., 104; 64 L. Ed., 168 31

P.

Pacific Gas & Electric Co. vs. Police Court, 251 U. S., 22; 64 L. Ed., 112 29

R.

R. R. vs. Asheville, 109 N. C., 688; 14 S. E., 316 17
Raleigh vs. Power Co., 180 N. C., 234; 104 S. E., 462 17
R. R. vs. Oates, 164 N. C., 167 (172); 80 S. E., 393 29
Raleigh vs. Peace, 110 N. C., 31; 14 S. E., 521 ..... 20, 35
R. C. L., Vol. 25, p. 1172 27

S.

St. Paul Gas Light Co. vs. St. Paul, 181 U. S., 142; 45 L. Ed., 788 14
Stearns vs. Minnesota, 179 U. S., 253; 45 L. Ed., 162 15

Page.

Sou. Wisconsin R. Co. vs. Madison, 240 U. S., 457; 60 L. Ed., 739 15
Southern P. R. Co. vs. Portland, 227 U. S., 559; 57 L. Ed., 642.. 17, 29
Sioux City St. Ry. Co. vs. Sioux City, 138 U. S., 98; 34 L. Ed., 898 ..... 18, 30
State vs. Johnson, 114 N. C., 846; 19 S. E., 599..... 19
Shepard vs. Comrs., 86 N. C., 552..... 22
Sanderlin vs. Luken, 152 N. C., 738; 68 S. E., 225..... 22
State vs. Jacksonville, etc., R. R. C., 29 Fla., 612; 10 Sou., 595.. 31
State vs. Dannenburg, 150 N. C., 799..... 32
State vs. Ray, 131 N. C., 816..... 32
State vs. Webber, 107 N. C., 962..... 32
State vs. Thomas, 118 N. C., 1221..... 32
State vs. Darnell, 166 N. C., 300..... 32

T.

Tarboro vs. Staton, 156 N. C., 501; 72 S. E., 577..... 22

U.

Union Pac. Ry. Co. vs. Philadelphia, 101 U. S., 528; 25 L. Ed., 912 18

V.

Vicksburg vs. Vicksburg Water Works, 206 U. S., 496; 51 L. Ed., 1155 17
Village of Madison vs. Alton, etc., R. Co., 235 Ill., 353; 85 N. E., 599 31

W.

Walsh vs. Columbus, etc., R. R. Co., 176 U. S,. 475; 44 L. Ed., 548 15
Walla vs. Walla Walla Water Co., 172 U. S., 1; 43 L. Ed., 341.. 17, 28
Wilson vs. Leary, 120 N. C., 90; 26 S. E., 630..... 20
Ward vs. Elizabeth City, 121 N. C., 1; 27 S. E., 993..... 20
Wharton vs. Greensboro, 146 N. C., 356; 59 S. E., 1043..... 20
West Chicago St. R. Co. vs. Illinois, 201 U. S., 506; 50 L. Ed., 845 30
Western Pav. Co. vs. Citizens, etc., R. R. Co., 128 Md., 533; 25 Am. St. Rep., 469..... 31

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 251.

DURHAM PUBLIC SERVICE COMPANY, PLAINTIFF IN ERROR,

vs.

CITY OF DURHAM, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

BRIEF IN BEHALF OF PLAINTIFF IN ERROR.

Statement.

This is a writ of error to the Supreme Court of the State of North Carolina to review a judgment affirming a judgment of the Superior Court of Durham County sustaining the validity of a street assessment, aggregating one hundred

two thousand nine hundred forty-two and 30/100 ($102,942.30) dollars, levied against the plaintiff in error for paving that portion of Main Street, in the City of Durham, alleged to be occupied by the street-railway tracks of the Durham Public Service Company.

That the City of Durham is, and was at the times herein mentioned, a municipal corporation existing under and by virtue of a charter granted by the Legislature of North Carolina and amended by the Public Laws of 1899, chapter 235. The portion of said charter relative to streets, sewers and sewerage, boundaries of streets, and power to borrow money pertinent to this controversy is as follows:

> "Among the powers hereby conferred upon the aldermen are the following: To open, grade, build and pave new streets; to repair, widen, ascertain location of, change, keep clean, alter and vary, and establish streets or grades of streets, alleys and sidewalks in said city; to improve, repair, grade, curb or pave the sidewalks or pavements now established, or that may hereafter be established in the said city, or cause the same to be improved, repaired, graded, curbed or paved, and recover from the owners or occupants of lots (fronting or adjoining the pavements in which curbing or pavements shall be made) one-half of the expense of the work, which expense shall be a lien on the said lot or lots. To construct or to contract for the construction of a system of sewerage in the city, to protect and regulate the same, by adequate ordinance, and if it shall be necessary, in obtaining proper outlets for such system, to extend the same beyond the corporate limits, then in such case the board of aldermen shall have proper power to extend it, and, both within and without the corporate limits to condemn property for the purpose of right

> of way or other requirements of the system, the proceedings of such condemnation to be the same as those prescribed hereinafter for condemning private property for streets, or as near as may be in the manner prescribed in chapter XLIX, volume I, of the Code of 1883. And in order to carry out, execute and enforce the powers hereinbefore given in this section, to borrow money, pledge the faith of the city of Durham, or loan its credit and levy and collect the taxes necessary to pay off and discharge any such debt, principal and interest, with the consent of the majority of the qualified voters of the city."

That under and by virtue of the general laws of North Carolina the following powers and duties with reference to streets and bridges were imposed upon cities and towns of North Carolina at the time, to wit, February 4, 1901, of the execution of the contract between the City of Durham and the Durham Traction Company, hereinafter referred to, said laws now being section 2930 of the Revisal of 1905 and section 2675 of the Consolidated Statutes of 1919:

> "The board of commissioners shall provide for keeping in proper repair the streets and bridges in the town in the manner and to the extent they may deem best; may cause such improvements in the town to be made as may be necessary, and may apportion the same equally among the inhabitants by assessments of labor or otherwise, and the citizens shall not be liable to work on the public roads without the limits of the town."

That in the year 1901 the Legislature of North Carolina, by an act duly enacted, chartered the Durham Traction Company, which has since changed its name and is now the

Durham Public Service Company, and authorized the said company to exercise the certain powers therein named, among them being the power, as set forth in section 2 of said charter, to lay tracks and operate a line of street railway thereon on the streets of the City of Durham, provided the permission of the board of aldermen—the governing body—of the City of Durham be first obtained.

(Copy of Charter, Record, pp. 9-13.)

That the Durham Traction Company then entered into negotiations with the properly constituted authorities of the City of Durham for the purpose of ascertaining the terms and conditions upon which permission could be obtained to lay its tracks and operate its line of street railway upon what streets of the City of Durham, if any, and then to determine for itself whether or not the terms and conditions were such as would justify it in exercising its corporate powers in this particular.

That as a result of these negotiations, in which the City of Durham was advised by its then city attorney, the late Victor S. Bryant, a most able lawyer, and in pursuance of the powers granted under its charter, the Durham Traction Company and the City of Durham entered into a contract on the 4th day of February, 1901, which said contract was duly adopted as an ordinance of the City of Durham by the unanimous vote of the board of aldermen of the City of Durham, and said contract was duly executed by the City of Durham and the Durham Traction Company.

(Copy of Contract, Record, pp. 14-17.)

That section 2, the part of said contract pertinent to this controversy, reads as follows:

"Second. That said tracks of the said Durham Traction Company, shall be located in the center of all of the said streets, avenues, and thoroughfares. The center of the said streets, avenues, and thoroughfares shall be marked by the Street Commissioner of the said city whenever he shall be called upon by the said Durham Traction Company, and he shall forthwith certify to the President of the Durham Traction Company that he has so marked the center of the streets, avenues, and thoroughfares with the date of their marking. The poles, wires, and appliances of the said railway shall be erected and placed under the supervision of the said Street Commissioner, and he shall certify his approval of the poles, wires, and appliances and the manner of erecting and placing them to the President of the said Durham Traction Company. As soon as the said tracks are completed and the poles, wires, and appliances are erected and placed, the portions of the streets and avenues that may have been used for these purposes shall be repaired and restored at said company's cost and expense to their former condition so far as they may have been damaged by the placing and erecting of the tracks, poles, wires, and appliances. The said Durham Traction Company in laying its track upon the route herein described, on, over, and along the streets and avenues, shall follow the grade to be designated by the Street Commissioner, and it shall be his duty upon the application of said Durham Traction Company to furnish it with grades. The said Durham Traction Company whenever it shall be required so to do, shall cause its roadbed and track to be brought to surface grade at its own expense and costs, *but nothing herein contained shall be construed to require said Durham Traction Company to pave its roadbed,* but it shall be required to restore its roadbed

to the conditions in which it was at the time of laying said track, provided, however, that if the city decides to put in or change its sewerage pipes on any of the streets of the said city on which the tracks of said Durham Traction Company may be laid, the said city may require the said traction company to remove and replace, at its own expense, the said tracks, for said purpose and said city shall incur no liability for any delays or interruptions of the business or traffic of said traction company, caused thereby."

That the Durham Traction Company then immediately began the construction of its tracks and line of street railway on Main Street and other streets of the City of Durham, under the provisions of its charter and the terms and conditions of its contract with the City of Durham.

That subsequently, in the year 1902, the City of Durham paved that portion of Main Street lying between Church Street and Roxboro Street with vitrified brick, and paved certain other portions of Main Street with macadam; that the said Main Street was at that time occupied by the tracks of the Durham Traction Company, which had been laid under the terms and conditions of the contract between said company and the City of Durham, dated the 4th day of February, 1901, but no part of the cost of paving said street was charged or assessed against the said company or against the abutting landowners; that at times subsequent to the year 1902, but prior to the year 1915, the City of Durham paved portions of the streets occupied by the tracks of the Durham Traction Company and the City of Durham did not charge or assess any part of the cost of paving said streets against said company or against abutting landowners.

That in the year 1915, by chapter 56 of the Public Laws of North Carolina, the Legislature of North Carolina enacted a general law applicable to all municipalities, setting forth in detail the manner in which street and sidewalk improvements should be made in such municipalities as desired to avail themselves of the provisions of said act. By section 6, chapter 56, Public Laws, 1915 (now Consolidated Statutes of 1919, section 2708, sub-section 3), it was and is provided as follows:

> "If the resolution shall provide for a street improvement, it shall direct that any street railway company or other railroad company having tracks on the street or streets or part thereof to be improved shall make such street improvement with such material and of such a character as may be approved by the governing body in that part of said street or streets or part thereof which the governing body may prescribe, not to exceed, however, the space between the tracks, the rails of the tracks and 18 inches in width outside of the tracks of such company, and that unless such improvement shall be made on or before a date specified in such resolution, the governing body will cause such improvement to be made; *Provided, however,* That where any such company shall occupy such street or streets under a franchise or contract which otherwise provided, such franchise or contract shall not be affected by this section, except insofar as may be consistent with the provisions of such franchise or contract."

That, purporting to act under chapter 56 of the Public Laws of 1915, the governing authorities of the City of Durham, by resolution, as required by said act, provided for the

improvement of Main Street in said city, and it directed that the Durham Traction Company, now the Durham Public Service Company, having tracks on said street, should make such improvements, at its own expense, and prescribed the material for such said street improvement, and further prescribed that the said Durham Traction Company (now the Durham Public Service Company) should pave the space between its tracks, the rails of its tracks, and 18 inches in width outside its tracks; that the said Durham Traction Company now the Durham Public Service Company) refused to do such street paving; that thereupon the said City of Durham caused such improvement to be made and assessed against the said Durham Traction Company (now the Durham Public Service Company) the costs thereof, amounting to the sum of one hundred two thousand nine hundred forty-two and 30/100 dollars ($102,942.30).

That, pursuant to notice published in a newspaper, the Board of Aldermen of the City of Durham met on November 16, 1920, for the purpose of hearing allegations and objections with respect to said assessment, whereupon the Durham Public Service Company appeared and presented in writing and filed with the Board of Aldermen of the City of Durham, in the office of the clerk of said board, allegations or objections as to why said assessment should not be made against the Durham Public Service Company, all as required by the statute under which the assessment was sought to be made.

(For allegations or objections, Record, pp. 1-8.)

That on said November 16, 1920, the said Board of Aldermen nevertheless confirmed the assessment against the Durham Public Service Company for the paving of Main Street.

That the section of Main Street over which the assessment extends is 2.02 miles in length, and, including double tracks, there are 2.65 miles of track on Main Street; that there are 154 abutting property-owners upon the paved portion of Main Street; that the assessment against the Durham Public Service Company for paving Main Street is $102,942.30 and against the said 154 property-owners is $89,909.56; that the value of the property of the Durham Public Service Company on Main Street within the area which is directly affected by said paving is $100,000.00, and the assessed value for taxation of said abutting property is approximately $5,083,250.00, exclusive of the value of property on Main Street not assessed.

That the grade of Main Street was changed and altered preparatory to the laying of the pavement, and the cost to the Durham Public Service Company of furnishing new rails and new cross-ties, of taking up and relaying its track on Main Street, and doing other work preparatory to the laying of the pavement upon said Main Street, was $75,108.85, which has been paid by the said company and which outlay and expenditure was made at the order of the City of Durham, under the terms and provisions of the contract between the City of Durham and the said company, dated the 4th day of February, 1901; that during the twelve months ending May 31, 1921, the company's street railway showed a deficit of $17,388.73 and failed by that amount to meet the operating expenses and allowance for depreciation; that if the company is required to pay the paving assessment as demanded, to wit, one-tenth of said assessment each year, with interest, then there will be an additional expense each

year of one-tenth of $102,942.30, plus interest, and depreciation on same; that the said company is engaged in other business, to wit, lighting, power and ice, and running a store in which it sells electrical fixtures, and its gross earnings from all sources for the year ending December 31, 1920, were approximately $540,000.00 and the net earnings, $147,000.00, the company having other valuable property and business not on Main Street, including other railway not on Main Street.

That the Durham Public Service Company objected to said assessment and contended that:

1. The imposition of said assessment for the paving of that portion of Main Street in the City of Durham occupied by its tracks impaired the obligations of the contract between the City of Durham and the Durham Traction Company dated the 4th day of February, 1901.

2. Said assessment was invalid and was contrary to article 1, section 10, clause 1, of the Constitution of the United States.

3. Said assessment was unreasonable and excessive and discriminatory and not proportioned to the benefits received by the Durham Public Service Company, but a mere arbitrary amount, and deprived the Durham Public Service Company of the equal protection of the law, as guaranteed by articles V and XIV of the Constitution of the United States.

That on the 16th day of November, 1920, the Board of Aldermen of the City of Durham overruled and disallowed the objections and exceptions to said assessment filed by the Durham Public Service Company, and that said company within ten days, as provided by the statute, its said allega-

tions and objections having been put in writing and filed in the office of the clerk of the said Board of Aldermen, and the said Board of Aldermen having confirmed said assessment, gave due notice in writing of an appeal to the Superior Court of Durham County within ten days after the confirmation of said assessment; that at the June term, 1921, of the Superior Court of Durham County the appeal of the Durham Public Service Company was set for trial, and the same was tried at said term; that the court held that the ordinance of the City of Durham confirming said assessment did not impair the obligations of any contract between the City of Durham and the Durham Traction Company (now the Durham Public Service Company); that the City of Durham had the power and authority to assess said company for the costs of said improvement, and adjudged that the city of Durham recover of the Durham Public Service Company the sum of one hundred two thousand nine hundred forty-two and 30/100 ($102,942.30) dollars for the costs of paving Main Street; that thereupon the Durham Public Service Company appealed from said judgment to the Supreme Court of North Carolina; that the Supreme Court of North Carolina affirmed said judgment in an opinion filed by Associate Justice Hoke on November 2, 1921, which opinion is reported in 182 N. C., 333.

That thereupon the Durham Public Service Company applied for a writ of error to review said judgment and the same was duly issued and granted.

Summary of Questions Involved.

The plaintiff in error submits that the Superior Court of Durham County and the Supreme Court of the State of

North Carolina erred in sustaining the validity of said assessment for that said courts did not hold that:

1. The City of Durham, acting through its Board of Aldermen, on the 4th day of February, 1901, had the power to enter into the contract with the Durham Traction Company executed as of that day.

2. The said contract contains an agreement with the Durham Traction Company that said traction company should not be required to pave its roadbed.

3. The said contract is binding upon said parties according to its terms, unless the same is changed or modified by consent of both parties.

4. There has been no change, alteration, or modification of this provision by consent of both parties.

5. The resolution requiring the Durham Traction Company to pave its roadbed and the ordinance of the City of Durham confirming an assessment against the said company of one hundred two thousand nine hundred forty-two and 30/100 ($102,942.30) dollars, the cost of doing said work, impaired the obligations of the said contract between the City of Durham and the Durham Traction Company, and the said ordinance was invalid and forbidden by article I, section 10, clause 1, of the Constitution of the United States.

6. The Legislature of North Carolina, by section 6, chapter 56, Public Laws of 1915, did not confer upon the City of Durham, acting through its Board of Aldermen, the right to violate the terms of its contract with the Durham Traction Company, and did not, under the power reserved to it in the

Constitution of the State, impose additional burdens upon the plaintiff in error.

7. The assessment was unreasonable, excessive, and discriminatory, not proportioned to the benefits received, but a mere arbitrary amount and deprives the Durham Traction Company of the equal protection of the law as guaranteed by the V and XIV Amendments to the Constitution of the United States.

8. The value of taxable property of abutting landowners on Main Street in the paving district being $3,083,250.00, and such property assessed for street paving with the sum of $89,909.00, and the value of the property of the Durham Traction Company being valued at about $100,000.00, and such property assessed for street paving with the sum of $102,942.30, is convincing evidence that said assessment is unreasonable, discriminatory, arbitrary, and not proportioned to the benefits received.

9. To enforce the collection of said assessment would be a discrimination against the Durham Traction Company, the taking of its property wrongfully, unjustly, arbitrarily, oppressively, and without due process of law, the City of Durham preparatory to paving having required the Durham Traction Company, under its contract, to relay its track on Main Street at a cost to said company of $75,108.55, which has been paid by said company and is not included as a part of said assessment.

10. The City of Durham has heretofore, between February 4, 1901, and the year 1915, recognized the binding force of the contract between it and the Durham Traction Company

by not requiring the said company to pave its roadbed and by not assessing against said company any part of the cost of paving streets in said city whereon tracks of said company were laid when said city paved a portion of Main Street with vitrified brick and another portion with macadam and paved other streets with macadam at various times and by different boards of aldermen or commissioners.

ARGUMENT.

An Ordinance is a Law.

An ordinance of a municipality, duly enacted by the properly constituted governing authorities, is a law of the State within the meaning of article I, section 10, clause 1, of the Constitution of the United States that "No State shall * * * pass any law impairing the obligations of contracts."

St. Paul Gas Light Co. *vs.* St. Paul, 181 U. S., 142; 45 L. Ed., 788.

Davis & F. Mfg. Co. *vs.* Los Angeles, 189 U. S., 207; 47 L. Ed., 778.

Mercantile Trust & Dept. Co. *vs.* Columbus, 203 U. S., 311; 51 L. Ed., 198.

Northern P. Rd. Co. *vs.* Duluth, 208 U. S., 583; 52 L. Ed., 630.

The Determination of the State Supreme Court Not Conclusive on This Court.

This court possesses paramount authority, when reviewing the final judgment of a State court upholding a State enact-

ment alleged to be in violation of the "contract clause" of the Constitution, to determine for itself the existence or non-existence of the contract set up and whether its obligations have been impaired by the State enactment.

Jefferson Branch Bank *vs.* Skelly, 66 U. S., 436; 17 L. Ed., 173.

Louisville Gas Co. *vs.* Citizens Gas Co., 115 U. S., 683; 29 L. Ed., 510.

Bacon *vs.* Texas, 163 U. S., 207; 41 L. Ed., 132.

Douglas *vs.* Kentucky, 168 U. S., 488; 42 L. Ed., 553.

Chicago, B. & Q. R. Co. *vs.* Nebraska, 170 U. S., 57; 42 L. Ed., 948.

Walsh *vs.* Columbus, etc., R. R. Co., 176 U. S., 475; 44 L. Ed., 548.

Stearns *vs.* Minnesota, 179 U. S., 233; 45 L. Ed., 162.

Northern P. Rd. Co. *vs.* Minnesota, 208 U. S., 590; 52 L. Ed., 633.

Grand Trunk, etc., R. Co. *vs.* South Bend, 227 U. S., 544; 57 L. Ed., 633.

N. Y. Electric Lines Co. *vs.* Empire City Subway Co., 235 U. S., 186; 59 L. Ed., 189.

Sou. Wisconsin R. Co. *vs.* Madison, 240 U. S., 457; 60 L. Ed., 739.

The City of Durham Was Authorized by the Act of the Legislature of North Carolina to Contract with the Durham Traction Company.

The act of the Legislature incorporating the Durham Traction Company (Record, pp. 9-13, incl.) and constituting said company's charter authorized and empowered it to "promote, establish, conduct, and maintain the business of a general

street railway, light, and power company" and vested in said company the power to "locate, lay, erect, construct, equip, maintain, and operate its line or lines of street railway and its poles, wires, subways, conduits, pipes, mains, and other fixtures and appliances necessary for the proper, full, and convenient carrying on of the business of said company in, over, and along the roads, avenues, lanes, alleys, and other public highways in the said city and county, *permission being first had from the Board of Aldermen of the City of Durham for work authorized to be done hereunder within the limits of the said city*, and permission being first had from the Board of Commissioners of the county of Durham for work to be done hereunder within the limits of the said county and outside of the corporate limits of the city of Durham." Without this express permission, the Durham Traction Company could not use the streets of the City of Durham for any of these purposes. The authorities of the city were thus conferred with the right to withhold permission entirely or impose terms which the company might have been unable or unwilling to accept, in which event the charter granted by the State would have been nugatory, or to grant permission upon such terms and conditions, acceptable to the company, as its Board of Aldermen considered proper and as were not forbidden by the Constitution of the State or some general statute in force at that time. The Board of Aldermen unanimously gave its permission and did, by contract executed on February 4, 1901 (Record, pp. 14-17, incl.), prescribe the terms, conditions, privileges, and franchises of their permission or grant. This contract was accepted by the Durham Traction Company, its corporate powers exercised thereunder, and it then became a valid contract between the parties, bind-

ing and enforceable upon each party according to its terms and conditions and protected from impairment by the "contract clause" of the Federal Constitution.

Walla Walla *vs.* Walla Walla Water Co., 172 U. S., 1; 43 L. Ed., 341.

Detroit *vs.* Detroit Citizens Street R. Co., 184 U. S., 368; 46 L. Ed., 592.

Knoxville Water Co. *vs.* Knoxville, 189 U. S., 434; 47 L. Ed., 887.

Cleveland *vs.* Cleveland City R. Co., 194 U. S., 517; 48 L. Ed., 1102.

Blair *vs.* Chicago, 201 U. S., 400; 50 L. Ed., 801.

Vicksburg *vs.* Vicksburg Water Works, 206 U. S., 496; 51 L. Ed., 1155.

Louisville *vs.* Cumberland T. & T. Co., 224 U. S., 649; 56 L. Ed., 934.

Grand Trunk W. R. Co. *vs.* South Bend, 227 U. S., 544; 57 L. Ed., 633.

Southern P. R. Co. *vs.* Portland, 227 U. S., 559; 57 L. Ed., 642.

Detroit United Railway *vs.* Michigan, 242 U. S., 238; 61 L. Ed., 268.

Columbus Ry., P. & L. Co. *vs.* Columbus, 249 U. S., 399; 63 L. Ed., 669.

The power of cities and towns to contract for the occupancy of its streets by a street railway has been fully recognized in prior decisions of the Supreme Court of North Carolina, and such contracts have been enforced *according to their terms.*

R. R. *vs.* Asheville, 109 N. C., 688; 14 S. E., 316.

New Bern *vs.* R. R., 159 N. C., 542; 75 S. E., 807.

Raleigh *vs.* Power Co., 180 N. C., 234; 104 S. E., 462.

No Power to Amend or Repeal is Reserved.

The City of Durham did not reserve the right to amend or repeal its contract with the Durham Traction Company. Neither is the power to amend or repeal it reserved to the city in the general laws of the State. In the absence of a reservation in the contract itself or in the general laws, this court has repeatedly held that such contracts were enforceable according to their terms.

Union Pac. Ry. Co. *vs.* Philadelphia, 101 U. S., 528; 25 L. Ed., 912.

Sioux City Ry. Co. *vs.* Sioux City, 138 U. S., 98; 34 L. Ed., 898.

Chicago, B. & Q. R. Co. *vs.* Nebraska, 170 U. S., 57; 42 L. Ed., 948.

Covington *vs.* Commonwealth of Kentucky, 173 U. S., 231; 43 L. Ed., 679.

Citizens Savings Bank *vs.* Owensboro, 173 U. S., 239; 43 L. Ed., 840.

Columbus Ry., P. & L. Co. *vs.* Columbus, 249 U. S., 399; 63 L. Ed., 669.

Louisville *vs.* Cumberland T. & T. Co., 224 U. S., 649; 56 L. Ed., 934.

On the contrary, the Legislature of the State of North Carolina, as a part of the act (Laws of 1915, chap. 56, sec. 6; Consolidated Statutes 1919, vol. 1, sec. 2708; act in full, Appendix A of this brief) under which the City of Durham proceeded in paving Main Street, for which it assessed the Durham Public Service Company, enacted that where "*any such company shall occupy such street or streets under a franchise or contract which otherwise provided, such franchise or con-*

tract shall not be affected by this act except in so far as this act may be consistent with the provisions of such franchise or contract."

By this provision it is clear that the Legislature not only did not intend to impose, under its reserve power to alter, amend, or repeal, additional conditions or burdens or to alter conditions and terms already imposed and existent, but, fully recognizing that cities may have dealt with the occupancy of their streets by street-railway companies by contracts with such companies, denied the cities so contracting the power to assess such companies except in so far as was consistent with their contracts. Such a conclusion is irrestible; otherwise this proviso is meaningless and nugatory. No better case could be presented to invoke its application than the instant case.

It is conceded that the Constitution of North Carolina, article VIII, section 1, reserves to the Legislature of the State the power to alter or repeal charters of corporations other than municipal in the following language: "All such general laws and special acts may be altered from time to time or repealed; and the General Assembly may at any time by special act repeal the charter of any corporation," and that article VIII, section 4, and article VII, section 12, gives to the General Assembly plenary power to create, amend, and repeal charters granted to municipal corporations and prescribe their powers and duties, except that all taxes levied by any city or town shall be uniform and *ad valorem* upon all property in the same, except such property as is exempted by the Constitution.

Lilly *vs.* Taylor, 88 N. C., 490.

State *vs.* Johnson, 114 N. C., 846; 19 S. E., 599.

Wilson *vs.* Leary, 120 N. C., 90; 26 S. E., 630.
Ward *vs.* Elizabeth City, 121 N. C., 1; 27 S. E, 993.
Wharton *vs.* Greensboro, 146 N. C., 356; 59 S. E., 1043.
Lutterloh *vs.* Fayetteville, 149 N. C., 65; 62 S. E., 758.
Burgin *vs.* Smith, 151 N. C., 588; 66 S. E., 569.
R. R. *vs.* Oates, 164 N. C., 167 (172); 80 S. E., 398.

The general law of North Carolina imposes upon the governing authorities of cities and towns the duty of keeping in repair the streets and bridges in the town and grants such authorities the power to apportion the cost equally among the inhabitants by assessments of labor or otherwise. The City of Durham, by its charter, was authorized to open, grade, and pave the streets of the city and, to provide the means to execute this power, was authorized to levy and collect taxes and borrow money. Such were the powers vested in the City of Durham by general law and the terms of its charter at the time of the passage of the Act of 1915. Independent of this act no authority existed under which the City of Durham could levy assessments against abutting property-owners or street-railway companies for the cost of paving its streets.

Raleigh *vs.* Peace, 110 N. C., 31 (40).

The power in general of the Legislature, either directly or through its recognized governmental agencies, to impose assessments for local street improvements and to prescribe the basis for apportioning the cost is conceded and is not involved in this action. The well-established principles beyond which the Legislature cannot go are discussed later on in this brief. The power to levy assessments for street

improvements, however, must be exercised or granted by the Legislature, and, having the power to grant, it has the power to impose limitations and restrictions upon its agencies. Such limitations and restrictions then become binding and obligatory upon any agency seeking to exercise the granted power.

These principles were asserted and expressly declared by the Supreme Court of North Carolina in Raleigh *vs.* Peace (1892), 110 N. C., 34; 14 S. E., 521, in which the court held:

> "1. Special assessments for local municipal improvements are not within the restraints imposed by article VII, sec. 9 (*i. e.*, all taxes levied shall be uniform and *ad valorem* upon all property), of the Constitution, but the rule of uniformity must be observed.
>
> "2. Such assessments are founded upon the principle that the land abutting upon the improvement receives a benefit over and above the property of the citizens generally, and should be charged with the value of such peculiar benefits.
>
> "3. The power to levy such assessments is derived solely from the Legislature, acting either directly or through its local instrumentalities, and the courts will not interfere with the exercise of the discretion vested in the Legislature as to the necessity for or the manner of making such assessments, unless there is a want of power, or the method adopted for the assessment of the benefits is so clearly inequitable as to offend some constitutional principle."

This case has been many times approved in later decisions of that Court.

> Asheville *vs.* Trust Co., 143 N. C., 360; 55 S. E., 800, citing Bauman *vs.* Ross, 167 U. S., 548 (589).

Kinston *vs.* Wooten, 150 N. C., 295; 63 S. E., 1061.
Tarboro *vs.* Staton, 156 N. C., 504; 72 S. E. 577.
Marion *vs.* Pilot Mountain, 170 N. C., 118; 87 S. E., 53.
Felmet *vs.* Canton, 177 N. C., 52; 97 S. E., 728.

All of these cases affirm the principle that the power to make these assessments is derived solely and entirely from the Legislature and subject to such limitations as it may impose, except that the assessment must be uniform in its application and must not be so plainly inequitable as to offend some constitutional principle.

While the power to impose these assessments for local improvements may be properly referred to, and, in the effort to classify this power, it is assigned to the sovereign power of taxation, yet the Supreme Court of North Carolina has repeatedly held that "these assessments are not taxes, licenses, or privileges, even though they be so styled by the Legislature itself. They are local assessments and are made with reference to special benefits derived from property assessed for the expenditure, while taxes are public burdens, imposed as burdens for the purpose of general revenue," and must be levied *ad valorem* on all property, real and personal.

Shepard *vs.* Comrs., 86 N. C., 552.
Sanderlin *vs.* Luken, 152 N. C., 738; 68 S. E., 225.
Comrs. *vs.* Webb, 160 N. C., 594; 76 S. E., 552.
Comrs. *vs.* Davis, 182 N. C., 140; 102 S. E., 506.

By the Act of 1915, the City of Durham was first vested with the authority to assess the cost of street paving against abutting landowners. There was no attempt by the Legis-

lature to exercise or extend its reserve power to alter, amend, or repeal the charters or franchise of any street-railway company. Neither did the Legislature attempt to interfere with the contracts made by cities with street-railway companies, nor in any manner seek to alter or charge the terms or conditions imposed by such contracts upon such companies with reference to paving the roadbed. The Legislature was fully cognizant of the fact that the occupancy of streets by street-railway companies was the subject-matter of contract; that contracts had been made; that the terms and conditions of such contracts might be different from the obligations set out in section 6, chapter 56, Laws 1915, and, to remove all doubt as to its intention in respect thereto, it placed in said act the proviso that where *"any such company shal occupy such street or streets under a franchise or contract which otherwise provided, such franchise or contract shall not be affected by this act except in so far as this act may be consistent with the provisions of such franchise or contract."*

What, then, does the contract provide? Section 2 of said contract (Record, pp. 15-16) is the part thereof pertinent to the present controversy and reads as follows:

> "The said tracks of the said Durham Traction Company shall be located in the center of all of said streets, avenues and thoroughfares. The center of the said streets, avenues and thoroughfares shall be marked by the Street Commissioner of the said city whenever he shall be called upon by the said Durham Traction Company, and he shall forthwith certify to the President of the Durham Traction Company that he has so marked the center of the streets, avenues and thoroughfares with the date of their

marking. The poles, wires and appliances of the said railway shall be erected and placed under the supervision of the said Street Commissioner, and he shall certify his approval of the poles, wires and appliances and the manner of erecting and placing them, to the President of the said Durham Traction Company. As soon as the said tracks are completed and the poles, wires and appliances are erected and placed, the portions of the streets and avenues that may have been used for these purposes shall be repaired and restored at said company's cost and expense to their former condition so far as they may have been damaged by the placing and erecting of the tracks, poles, wires and appliances. The said Durham Traction Company in laying its track upon the route herein described, on, over and along the streets and avenues, shall follow the grade to be designated by the Street Commissioner, and it shall be his duty upon the application of said Durham Traction Company to furnish it with grades. The said Durham Traction Company whenever it shall be required so to do, shall cause its roadbed and track to be brought to surface grade at its own expense and costs, but nothing herein contained shall be construed to require said Durham Traction Company to pave its roadbed, but it shall be required to restore its roadbed to the conditions in which it was at the time of laying said track; *provided, however,* that if the city decides to put in or change its sewerage pipes on any of the streets of the said city on which the tracks of said Durham Traction Company may be laid, the said city may require the said traction company to remove and replace, at its own expense, the said tracks, for said purpose and said city shall incur no liability for any delays or interruptions of the business or traffic of said traction company caused thereby."

This section is clear and explicit in its terms, requiring, among other things, that the Durham Traction Company, "*whenever* it shall be required so to do, shall cause its roadbed and track to be brought to surface grade at its own expense and costs." The Durham Public Service Company recognized this obligation and expended the sum of $75,108.85 on Main Street (Record, p. 25) in compliance with this provision.

The Supreme Court of North Carolina, however, in dealing with this stipulation of the contract, to wit, "the said Durham Traction Company, whenever it shall be required so to do, shall cause its roadbed and track to be brought to surface grade at its own expense and costs, but nothing herein contained shall be construed to require said Durham Traction Company to pave its roadbed," held that "the ordinance is dealing and intends to deal with the things there required and under conditions then existing. There is nothing that purports to affect the future, nor which could prevent the city government, under more advanced conditions, in the exercise of the powers conferred upon it for the public good, from enacting ordinances that its streets be paved, and that this railroad, as an abutting owner, should bear its proper proportion of the cost." We respectfully submit that in this there is error.

The defendant in error relied in the Supreme Court of North Carolina upon the decision of this court in Sioux City Street Railway Company *vs.* City of Sioux City, 138 U. S., 98; 34 L. Ed., 898, but it is respectfully submitted that the statement of facts in that case clearly distinguished it from the instant case. In that case the Legislature of Iowa had a

power reserved to it in the Constitution of the law to impose additional burdens upon street-car companies operating in the cities of the State in regard to the paving of streets occupied by them, and the city of Sioux City, pursuant to said act, assessed the plaintiff in error in that case in accordance with a later act of the Legislature of the State, and this court held that said assessment was valid and constitutional.

In the instant case, conceding that the Legislature of the State of North Carolina had the power under the Constitution of the State, reserved to it, to pass an act increasing the burden upon the plaintiff in error in the instant case, the Legislature of North Carolina did not do so, but, on the contrary, expressly provided that the powers granted by it in the Act of 1915, chapter 56, section 6, should be exercised by the towns and cities in a manner consistent with the contracts between them and the street-railway companies.

So in the instant case there is no question of what the Legislature could do, under its reserve power in the constitution, but what did it do.

It will be noted that in quoting this stipulation from the ordinance, as it appears in the record, the court inadvertently placed in it the word "wherever" instead of "whenever," and its opinion declared "there was nothing in it that purports to affect the future." The adverb "whenever," used in the above-quoted section of the ordinance, means "at whatever time;" "it is an adverb of time rather than place; and, speaking from that time, its indication is future rather than past;" its look to the future is further emphasized by the words "shall be."

Kennebec & Portland R. Co. *vs.* Portland & Kennebec R. Co., 59 Maine, 9 (61).

Funkhauser *vs.* Spohr, 102 Va., 306 (310).

The adverb "wherever," used by the court, is one of *place* and not of *time*. The Durham Public Service Company urges that the words used in this section deal with the future, and the contract is obligatory during the terms of the franchise; the duties and obligations of the Public Service Company during construction had already been prescribed, in that it was required to repair and restore, as soon as the tracks were completed and the poles and wires erected, the streets and sidewalks to their former condition so far as they may have been damaged, and under the obligation of this stipulation the plaintiff in error had brought its roadbed and track to grade, as required by the defendant in error, at an expense of $75,108.85.

The Assessment Cannot be Justified as a Valid Exercise of the Police Power.

In 46 L. R. A., 196-203, the cases involving the construction of such contracts are collected, and in 25 R. C. L., page 1172, we find this observation:

> "Most, if not all, street-railway charters or franchises contain provisions in one form or another relative to the care of that portion of the streets occupied by the street-railway tracks, but no general rule of liability can be stated, as that depends in each case on the particular terms of the charter or franchise, and in construing a particular charter the decisions in other cases on the construction of analogous provisions are not of any great assistance. The document to be construed must be read as a whole, and in interpreting particular words these cannot be read without reference to what comes before and after."

The courts to which the construction of the provisions in such contracts dealing with the obligations in respect to street paving have been referred have confined themselves to a consideration of the meaning of the contract, and in no instance has the question been determined by a decision that the exercise of the police power was involved.

It is suggested that this contract is void as being contrary to public policy, in that the City of Durham, in abdication of its police power, entered into a contract which exempted the Durham Public Service Company from liability for paving its roadbed. We respectfully submit that the impairment of the obligation of this contract, or the deprivation of property without due process of law, or the denial of the equal protection of the laws, is not excused by the exercise of legislative power in securing the public safety, health, and morals—the exercise of the police power.

> "The argument that the contract is void as an attempt to barter away the legislative power of the city council rests upon the assumption that contracts for supplying a city with water are within the police power of the city, and may be controlled, managed and abrogated at the pleasure of the council. The court has doubtless held that the police power is one which remains constantly under the control of the legislative authority, and that a city council can neither bind itself nor its successors to contracts prejudicial to the peace, good order, health or morals of its inhabitants; but it is to cases of this class that these rulings have been confined."
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> Walla Walla *vs.* Walla Walla Water Co., 172 U. S., 1; 43 L. Ed., 341.
>
> N. O. Gas Light Co. *vs.* Louisiana Light, etc., Mfg. Co., 115 U. S., 650; 29 L. Ed., 516.

As illustrating the application of this doctrine:

PROTECTING PUBLIC HEALTH AND MORALS.

Northwestern Fert. Co. *vs.* Hyde Park, 97 U. S., 659; 24 L. Ed., 1036.
Butcher's Union S. H. & L. S. *vs.* Crescent City L. S. & S. H. Co., 111 U. S., 746; 28 L. Ed., 585.
New Orleans Gas Light Co. *vs.* Drainage Comms., 197 U. S., 453; 49 L. Ed., 831.
Mugler *vs.* Kansas, 123 U. S., 623; 31 L. Ed., 205.
Boston Beer Co. *vs.* Mass., 97 U. S., 33; 24 L. Ed., 992.
Foster *vs.* Kansas, 112 U. S., 206; 28 L. Ed., 697.
Lockner *vs.* New York, 198 U. S., 53; 49 L. Ed., 940.
Jacobson *vs.* Mass., 197 U. S., 31; 49 L. Ed., 652.
Austin *vs.* Tennessee, 179 U. S., 347; 45 L. Ed., 327.
Pacific Gas & Electric Co. *vs.* Police Court, 251 U. S., 22; 64 L. Ed., 112.

PROTECTING PUBLIC SAFETY.

Great Northern R. Co. *vs.* Minnesota, 246 U. S., 434; 62 L. Ed., 817.
Sou. Pacific Co. *vs.* Portland, 227 U. S., 559; 57 L. Ed., 642.
Atlantic Coast L. R. R. Co. *vs.* Goldsboro, 232 U. S., 558; 58 L. Ed., 726.
New York & N. E. R. Co. *vs.* Bristol, 151 U. S., 556; 38 L. Ed., 269.
Chicago M. & St. P. R. Co. *vs.* Minneapolis, 232 U. S., 430; 58 L. Ed., 671.
Chicago B. & Q. R. Co. *vs.* Nebraska, 170 U. S., 57; 42 L. Ed., 948.
Northern P. Rd. Co. *vs.* Minnesota, 208 U. S., 583; 52 L. Ed., 630.

W. Chicago St. R. Co. *vs.* Illinois, 201 U. S., 506; 50 L. Ed., 845.

Grand Trunk W. Ry. *vs.* South Bend, 227 U. S., 544; 57 L. Ed., 633.

Denver & Rio Grande R. Co. *vs.* Denver, 250 U. S., 241; 63 L. Ed., 958.

The cases invoking the police power to protect the safety of the public cover the use of steam locomotives; preventing switching within business sections except within fixed hours; bringing the grade of the railroad to the grade of street crossings; extinction of grade crossings; planking grade crossings; protecting grade crossings by gates or watchmen; placing the tracks in the center of the streets occupied; using safety devices; regulating speed; equipping cars with fenders or other safety devices; requiring street cars to come to a stop before crossing a street; building viaducts across tracks in city streets; repairing viaducts. As to all of these, it can be seen that they are reasonably required to promote the public safety; but as to paving, it would seem that this has been left to the domain of contract and, when covered by the provisions of the contract, protected from impairment by the contract clause of the Federal Constitution; so as to charges for transportation, unless the power to alter or change is reserved in the contract or in some general statute in force at the time.

Milwaukee E. R. & L. Co. *vs.* Wisconsin, 252 U. S., 100; 64 L. Ed., 476.

Detroit Elevated Railway *vs.* Michigan, 242 U. S., 238; 61 L. Ed., 268.

Sioux City Street Ry. Co. *vs.* Sioux City, 138 U. S., 98; 34 L. Ed., 898.

Chicago *vs.* Sheldon, 76 U. S., 50; 19 L. Ed., 594.

Village of Madison *vs.* Alton, etc., R. Co., 235 Ill., 353; 85 N. E., 599.

Enid City Ry. Co. *vs.* City of Enid, 43 Okla., 785; 144 Pac., 620.

Western Pav., etc., Co. *vs.* Citizens, etc., R. R. Co., 128 Md., 533; 25 Am. St. Rep., 469.

Norfolk, etc., Traction Co. *vs.* City of Norfolk, 115 Va., 172; 78 S. E., 546.

Madison *vs.* Sou. Wis. Ry. Co., 156 Wis., 373; 146 N. W., 500.

State *vs.* Jacksonville, etc., R. R. Co., 29 Fla., 612; 10 Sou., 595.

Oklahoma R. Co. *vs.* Severns Paving Co., 251 U. S., 104; 64 L. Ed., 168.

In Chicago, B. & Q. R. Co. *vs.* Nebraska, 170 U. S., 57; 42 L. Ed., 948, this court said:

> "Usually where a contract, not contrary to public policy, has been entered into between parties competent to contract, it is not within the power of either party to withdraw from its terms without the consent of the other; and the obligation of such a contract is constitutionally protected from hostile legislation. Where, however, the respective parties are not private persons, dealing with matters and things in which the public has no concern, but are persons or corporations whose rights and powers were created for public purposes, by legislative acts, and where the subject-matter is one which affects the safety and welfare of the public, other principles apply. *Contracts of the latter description are held to be within the supervis-*

> *ing power and control of the legislature when exercised to protect the public safety, health and morals,* and that clause which protects contracts from legislative action cannot in every case be successfully invoked."

Speaking of the exercise of the police power, the Supreme Court of North Carolina said in State *vs.* Dannenburg, 150 N. C., 799:

> "Municipal corporations have no inherent police powers and can exercise only those conferred by the State. 1 Dillon on Mun. Corp., sec. 89; State *vs.* Ray, 131 N. C., 816."
>
> "Any fair, reasonable doubt concerning the exercise of such powers is resolved by the courts against the corporation. State *vs.* Webber, 107 N. C., 962; State vs. Thomas, 118 N. C., 1221."

In the later case of State *vs.* Darnell, 166 N. C., 300, the same court said:

> "In 1 Dillon Mun. Corp., sec. 89, which is copied and approved in S. *vs.* Webber, 107 N. C., 962; 22 Am. St., 920, it is said: 'It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: (1) Those granted in express words; (2) those necessarily and fairly implied; (3) those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the exercise is resolved by the courts against the corporation, and the power is denied.' In S. *vs.* Thomas, 118 N. C., 1221, the court reiterated this doctrine and quoted with approval 1 Dillon Mun. Corp., sec. 325, as fol-

lows: 'An ordinance cannot legally be made which contravenes a common right, unless the power to do so be plainly conferred by a valid and competent grant.'" The court further quotes with approval the extract from S. *vs.* Dannenburg, *supra*.

Applying the foregoing principles and rules of construction to the instant case, nothing remains which can justify this assessment as a valid exercise of the police power.

The Assessment is Arbitrary, Unreasonable, Oppressive, and Discriminatory.

It seems to be settled that it is within the power of the Legislature to create and define the territorial limits of an improvement district, to determine the class of lands to be assessed for the improvement, and to determine the rule for the apportionment of the cost and expense, either in proportion to the position, the frontage, the area, or the market value of the lands, or in proportion to the benefits as estimated by the commissioners; but in the instant case the Legislature has arbitrarily fixed the portion of the street to be improved by the street-railway company and that the entire amount of the cost and expense of that portion shall be assessed against it, while, as to other property-owners in the district, it has fixed that they shall be charged by the frontage on the street only as to one-half the cost of the total improvement reduced by the amount of the assessment against the street-railway company. Sec. 6, chap. 56, Laws 1915, Appendix A.

The tax value (Record, p. 25) of the property of abutting owners on Main Street in the paving district is found to be five million eighty-three thousand ($5,083,000.00) dollars, and the assessment against this property is eighty-nine thou-

sand nine hundred nine and 56/100 ($89,909.56) dollars, or less than 2 per cent, while the assessment against the plaintiff in error's property on Main Street, whose value is found to be one hundred thousand ($100,000.00) dollars, is one hundred two thousand nine hundred forty-two and 30/100 ($102,942.30) dollars, or more than 100 per cent. It is apparent, therefore, that this assessment is wanting in the essential to its validity of uniformity, as held by the Supreme Court of North Carolina in the cases hereinbefore cited, and "the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is to the extent of such excess a taking, under the guise of taxation, of private property for public use without compensation. We say 'substantial excess' because exact equality of taxation is not always attainable."

Norwood *vs.* Baker, 172 U. S., 269; 43 L. Ed., 443.
French *vs.* Barber Asphalt Paving Co., 181 U. S., 324; 45 L. Ed., 879.

The Supreme Court of North Carolina, in Kinston *vs.* Wooten, 150 N. C., 295, held:

> "And while this case (referring to Norwood *vs.* Baker, 172 U. S., 269) has been explained and modified by subsequent decisions of the same court, notably in French *vs.* Paving Co., 181 U. S., 324, and other cases in this and later volumes, the principle remains and may be taken as established that, although the systems provided in different States will be upheld and usually recognized as conclusive, in so far as they establish general rules for imposing these assessments, yet, in applying these rules or any given method to the property of an individual owner, if it

should be made to appear that there is such marked disproportion between the burden imposed and any possible benefit as to make it clearly manifest that the principle of equality had been entirely ignored and gross injustice done, in such case the court may interfere and afford proper relief."

The same principle has been substantially declared by the same court in the case of Raleigh *vs.* Peace, 110 N. C., 34.

The settled general rule is that a State Legislature "may create taxing districts to meet the expense of local improvements and may fix the basis of taxation without encountering the 14th Amendment, unless its action is palpably arbitrary or a plain abuse."

Gast Realty & Invest. Co. *vs.* Schneider Granite Co., 240 U. S., 55; 60 L. Ed., 523.

If it is made to appear that there has been an arbitrary and unwarranted exercise of the legislative power, or some denial of the equal protection of the laws in the method of exercising it, judicial relief will be accorded to parties aggrieved.

Hancock *vs.* Muskogee, 250 U. S., 454; 63 L. Ed., 1081.

If, however, the statute providing for the tax is "of such a character that there is no reasonable presumption that substantial justice generally will be done, but the probability is that the parties will be taxed disproportionately to each other and to the benefit conferred, the law cannot stand against the complaint of one so taxed in fact."

Kansas City S. R. Co. *vs.* Road Imp. District No. 6, 256 U. S., 658; 65 L. Ed., 1151.

In the case just cited the commissioners were vested with some discretion in making the assessments, but in the instant case the Legislature "undertook to estimate the benefits to the property of the plaintiff in error without disclosing any basis therefor, but apparently according to some vague speculation as to present worth and possible future increased receipts from * * * passengers (the plaintiff in error hauls no freight) which would enhance its value, considered as a component part of the system."

"Obviously" the street-railway company "has not been treated like individual owners, and we think the discrimination so palpable and arbitrary as to amount to a denial of the equal protection of the law. Benefits from local improvements must be estimated upon contiguous property according to some standard which will produce approximately correct general results. * * * Classification, of course, is permissible, but we can find no adequate reason for what has been attempted in the present case. F. S. Royster Guano Co. *vs.* Virginia, 253 U. S., 412; 64 L. Ed., 989, 990. It is doubtful whether any very substantial appreciation in value of the" street-railway company "property within the district will result from the improvements; and very clearly it cannot be taxed upon some fanciful view of future earnings and distributed values while all other property is assessed solely according to" frontage. Street-railway "property may not be burdened for local improvements upon a basis so wholly different from that used for ascertaining the contribution demanded of individual owners as necessarily to produce manifest inequality. Equal protection of the law must be extended to all."

Kansas City S. R. Co. *vs.* Road Improvement District No. 6, 256 U. S., 658; 65 L. Ed., 1151.

The plaintiff in error urges that the facts found by the trial court (pars. 6 and 7, Record, pp. 25-26) and accepted by the State Supreme Court clearly manifest that the assessment upon the plaintiff in error's property on Main Street—the assessment district—is lacking in uniformity, is grossly unequal, unreasonable, and merely arbitrary. Applying to it any recognized or approved method—either the area, position, value, or front-foot method—the result is grossly unequal and inequitable. It imposes an excessive burden upon the plaintiff in error, whose revenues from operations of its street-railway properties showed a loss of seventeen thousand three hundred eighty-eight and 73/100 ($17,388.73) dollars for the year ending May 31, 1921, as found by the trial court. The fact that the plaintiff in error received enough through its other properties and business to consume this loss and show a net profit ought not to justify the manifest inequality and arbitrary amount of this assessment.

The plaintiff in error respectfully submits that the Supreme Court of North Carolina was in error in the judgment rendered in this cause, and that said judgment should be reversed.

JAMES S. MANNING,
W. L. FOUSHEE,
JOHN H. MANNING,
Counsel for Plaintiff in Error.

APPENDIX A.

CHAPTER 56.

An Act Relating to Local Improvements in Municipalities.

The General Assembly of North Carolina do enact:

SECTION 1. In this act the term "municipality" means any city or town in the State of North Carolina now or hereafter incorporated;

"Governing body" includes the board of aldermen, board of commissioners, council, or other chief legislative body of a municipality;

"Street improvement" includes the grading, regrading, paving, repaving, macadamizing and remacadamizing of public streets and alleys, and the construction, reconstruction and altering of curbs, gutters and drains in public streets and alleys;

"Sidewalk improvement" includes the grading, construction, reconstruction and altering of sidewalks in public streets or alleys, and may include curbing and gutters;

"Local improvement" means any work undertaken under the provisions of this act, the cost of which is to be specially assessed, in whole or in part, upon property abutting directly on the work;

"Frontage" when used in reference to a lot or parcel of land abutting directly on a local improvement, means that side or limit of the lot or parcel of land which abuts directly on the improvement.

SEC. 2. This act shall apply to all municipalities. It shall not, however, repeal any special or local law or affect any proceedings under any special or local law, for the making of street, sidewalk or other improvements hereby authorized, or for the raising of funds therefor, but shall be deemed to be

additional and independent legislation for such purposes and to provide an alternative method of procedure for such purposes, and to be a complete act, not subject to any limitation or restriction contained in any other public or private law or laws, except as herein otherwise provided.

SEC. 3. Every resolution passed pursuant to this act shall be passed in the manner prescribed by other laws for the passage of resolutions. Whenever a resolution or notice is required by this act to be published, it shall be published at least once in a newspaper published in the municipality concerned, or, if there be no such newspaper, such resolution or notice shall be posted in three public places in the municipality for at least five days.

SEC. 4. Every municipality shall have power, by resolution of its governing body, upon petition made as provided in the next succeeding section, to cause local improvements to be made and to defray the expense of such improvements by local assessment, by general taxation, and by borrowing, as herein provided. No petition shall be necessary, however, for the ordering or making of private water, sewer and gas connections as hereinafter provided. Nor shall a petition be necessary for the making of sidewalk improvements in those municipalities in which by other law or laws sidewalk improvements are authorized to be made without petition.

SEC. 5. The petition for a local improvement shall be signed by at least a majority in number of the owners, who must represent at least a majority of all the lineal feet of frontage of the lands (a majority in interest of owners of undivided interests in any piece of property to be deemed and treated as one person for the purpose of the petition) abutting upon the street or streets or part of a street or streets proposed to be improved. The petition shall cite this act and shall designate by a general description the local improvement to be undertaken and the street or streets or part

thereof whereon the work is to be effected. The petition shall be lodged with the clerk of the municipality, who shall investigate the sufficiency thereof, submit the petition to the governing body, and certify the result of his investigation. The determination of the governing body upon the sufficiency of the petition shall be final and conclusive.

SEC. 6. The preliminary resolution determining to make a local improvement shall, after its passage, be published. Such resolution shall designate by a general description the improvement to be made, and the street or streets or part or parts thereof whereon the work is to be effected, and the proportion of the cost thereof to be assessed upon abutting property and the terms and manner of the payment. If such resolution shall provide for a sidewalk improvement, it may, in those municipalities in which the owners of the abutting property are required to make payment of the entire cost thereof, without petition, direct that the owners of the property abutting on the improvement make such sidewalk improvement, and that unless the same shall be made by such owners on or before a day specified in the resolution, the governing body may cause such sidewalk improvement to be made. If the resolution shall provide for a street improvement, it shall direct that any street railway company or other railroad company having tracks on the street or streets or part thereof to be improved shall make such street improvement with such material and of such a character as may be approved by the governing body, in that part of such street or streets or part thereof which the governing body may prescribe, not to exceed, however, the space between the tracks, the rails of the tracks, and eighteen inches in width outside of the tracks of such company, and that unless such improvement shall be made on or before a day specified in such resolution, the governing body will cause such improvement to be made: *Provided, however,* That where any such company shall occupy such

street or streets under a franchise or contract which otherwise provided, such franchise or contract shall not be affected by this act, except in so far as this act may be consistent with the provisions of such franchise or contract. If the resolution shall provide for a street or sidewalk improvement, it may, but need not, direct that the owners of all property, abutting on the improvement shall connect their several premises with water mains, gas and sewer pipes located in the street adjacent to their several premises in the manner prescribed in such resolution, and that unless such owners shall cause such connection to be made on or before a day specified in such resolution, the governing body will cause the same to be made.

SEC. 7. The governing body shall have power to determine character and type of construction and of material to be used in making a local improvement, and whether the work, where not done by owners of abutting property or by a street or other railroad company, shall be done by the forces of the municipality or by contract: *Provided*, That for the purposes of securing uniformity in the work the governing body shall always have the power to have all street paving done by the forces of the municipality or by contract under the provisions of this act.

SEC. 8. One-half of the total cost of a street or sidewalk improvement made by a municipality, exclusive of so much of the cost as is incurred at street intersections and the share of railroads or street railways, shall be specially assessed upon the lots and parcels of land abutting directly on the improvements, according to the extent of their respective frontages thereon, by an equal rate per foot of such frontage, unless the petition for such street or sidewalk improvement shall request that a larger proportion of such cost, specified in the petition, be so assessed, in which case such larger proportion shall be so assessed, and the remainder of such

cost shall be borne by the municipality at large. The cost of that part of a street improvement required to be borne by a railroad or street railway company, and made by the municipality after default by a railroad or street railway company in making the same, as hereinbefore provided, shall be assessed against such company, and shall be collected in the same manner as assessments are collected from abutting property-owners, and such assessments shall be a lien on all of the franchises and property of such railroad or street railway company. The entire cost of a sidewalk improvement required to be made by owners of property abutting thereon, and made by the municipality after default by such property-owners in making the same, as hereinbefore provided, shall be assessed against the lots and parcels of land abutting on that side of the street upon which the improvement is made and directly on the improvement, according to their respective frontages thereon, by an equal rate per foot of such frontage. The entire cost of each water, gas and sewer connection, required to be made by the owner of the property for or in connection with which such connection was made, but made by the municipality after default by such property-owner in making the same, as hereinbefore provided, shall be specially assessed against the particular lot or parcel of land for or in connection with which it was made. No lands in the municipality shall be exempt from local assessment.

SEC. 9. Upon the completion of any local improvement the governing body shall compute and ascertain the total cost thereof. In the total cost shall be included the interest paid or to be paid on notes or certificates of indebtedness issued by the municipality to pay the expense of such improvement pursuant to section 12 of this act incident to the improvement and the assessment therefor. The governing body must thereupon make an assessment of said total cost pursuant to the provisions of section 8 of this act, and for that purpose must make out an assessment roll in which

must be entered the names of the persons assessed as far as they can ascertain the same, and the amount assessed against them respectively, with a brief description of the lots or parcels of land assessed. Immediately after such assessment-roll has been completed, the governing body shall cause it to be deposited in the office of the clerk of the municipality for inspection by parties interested, and shall cause to be published a notice of the completion of the assessment-roll, setting forth a description in general terms of the local improvement, and the time fixed for the meeting of the governing body for the hearing of allegations and objections in respect of the special assessment, such meeting not to be earlier than ten days from the first publication or posting of said notice. Any number of assessment-rolls may be included in one notice. At the time so appointed, or at some other time to which it may adjourn, for that purpose, the governing body or a committee thereof, must hear the allegations and objections of all persons interested, who appear, and may make proof in relation thereto. The governing body may thereupon correct such assessment-roll, and either confirm the same or may set it aside, and provide for a new assessment. Whenever the governing body shall confirm an assessment for a local improvement the clerk of the municipality shall enter on the minutes of the governing body the date, hour, and minutes of such confirmation, and from the time of such confirmation the assessments embraced in the assessment-roll shall be a lien on the real property against which the same are assessed, superior to all other liens and incumbrances. After the roll is confirmed a copy of the same must be delivered to the tax collector or other officer charged with the duty of collecting taxes. If a person assessed is dissatisfied with the amount of the said charge he may give notice within ten days after such confirmation that he takes an appeal to the next term of the superior court of the county in which said municipality is located, and shall within five days thereafter, serve a statement of facts upon

which he bases his appeal, but said appeal shall not delay or stop the said improvements. The said appeal shall at the said term of court be tried as other actions at law. The governing body may correct, cancel, or remit any assessment for a local improvement, and may remit, cancel, or adjust the interest or penalties on any such assessment. The governing body has the power, when in its judgment there is any irregularity, omission, error, or lack of jurisdiction in any of the proceedings relating thereto, to set aside the whole of the local assessment made by it, and thereupon to make a reassessment. In such case there shall be included as a part of the costs of the public improvement involved, all interest paid or accrued on notes or certificates of indebtedness, or assessment bonds issued by the municipality to pay the expenses of such improvement, and the proceeding shall be in all respects as in cases of local assessment and such reassessment shall have the same valid and binding force as if it had originally been properly made.

SEC. 10. The property-owner or railroad or street-railway company hereinbefore mentioned shall have the option and privilege of paying for said improvements hereinbefore provided for in cash, or if they should so elect and give notice of the fact in writing to the municipality within thirty days after the notice mentioned in next succeeding section, they shall have the option and privilege of paying said assessments in not less than five nor more than ten equal annual installments as may have been determined by the governing body in the original resolution authorizing such improvement. Said installments shall bear interest at the rate of six per centum per annum from date of the confirmation of the assessment-roll, and in case of the failure or neglect of any property-owner or railroad or street-railway company to pay said installment when the same shall become due and payable, then and in that event all of the said installments remaining unpaid shall at once become due and payable

and said property and franchises shall be sold by said municipality under the same rules, regulations, rights of redemption and savings as are now prescribed by law for the sale of land for unpaid taxes. The whole assessment may be paid at the time of paying any installment by payment of the principal and all interest accrued to that date.

SEC. 11. That after the expiration of twenty days from the confirmation of an assessment-roll the tax collector or such other officer of the municipality as the governing body may direct so to do shall cause to be published in a newspaper published in the municipality, or if there be no such newspaper, shall cause to be posted in at least three public places therein, a notice that any assessment contained in said assessment-roll, naming and describing it, may be paid to him at any time before the expiration of thirty days from the first publication of said notice without any addition. In the event said assessment be not paid within said time and the same shall bear interest at the rate of six per cent per annum from the date of the confirmation of the assessment-roll and shall become due and payable on the date on which taxes are payable: *Provided,* That where an assessment is divided into installments one installment shall become due and payable each year on the date on which taxes are due and payable. If any assessment or installment thereof is not paid when due, it shall be subject to the same penalties as are now prescribed for unpaid taxes, in addition to the interest herein provided for.

SEC. 12. At any time before the cost of any local improvement shall be computed and ascertained as provided in section 9 of this act, the governing body may from time to time by resolution authorize the treasurer to borrow money to the extent required to pay the cost of any such improvement or to repay any money borrowed under this section with interest thereon. The resolution authorizing any such loan or loans may provide for the issue of notes or certificates

of indebtedness of the municipality, or both, payable either on demand or at a fixed time, not more than six months from date thereof and bearing interest not exceeding 6 per centum per annum. Said notes or certificates may be sold at public or private sale, or pledged as security for temporary loans, as the governing body may by such resolution direct. Any temporary indebtedness incurred under the authority of this section, with the interest thereon may be paid out of moneys raised by the issue and sale of "local-improvement bonds" or "assessment bonds," or both, to be issued and sold as hereinafter provided, or may be included in the annual tax levy.

SEC. 13. After the governing body of said municipality shall have levied said assessment against the property abutting upon said street or streets, the city clerk or person designated, shall have prepared from such assessment-roll and deliver to the tax collector or person designated, a well-bound book styled "Special Assessment Book," which shall be so ruled as to conveniently show:

1. Name of owner of such property.

2. The number of lot or part of lot and the plan thereof if there be a plan.

3. The frontage of said lot.

4. The amount that has been assessed against such lot.

5. The amount of such installments and the day on which installments shall become due.

Such book shall be indexed according to the name of the owners of the property and entries of all payments or partial payments shall be immediately entered upon said book when made, and said book shall be open to the inspection of any citizen of the municipality.

SEC. 14. Whenever an assessment for any local improvement shall have been confirmed, the governing body may by resolution direct that the amount and proportion of the expense of such improvement which shall be borne by the municipality at large shall be raised by the issuance of bonds of the municipality to be known as "Local Improvement Bonds." Such bonds shall be payable at such time or times, not exceeding thirty years from their date, as the governing body shall determine. There shall be raised annually by tax upon all the taxable property of the municipality, after the issuance of any such bonds, a sum sufficient to meet and pay the interest thereon, as the same becomes due, and a sum to be paid into a sinking fund which will, together with the accumulations thereof, provide a fund sufficient to meet and pay the principal of said bonds at maturity: *Provided, however,* that if such bonds be made payable in annual installments substantially equal in amount, the first of which installments shall be payable within two years from date of such bonds and the last within twenty years of such date, the governing body authorizing such bonds, in lieu of providing for a sinking fund to meet the principal of such bonds, shall cause to be raised by taxation in each year in which an installment of principal shall be payable, or in the next preceding year, an amount sufficient to meet said installment, in addition to the annual tax during the life of the bonds to provide for the payment of the interest accruing thereon. The municipality's share of two or more improvements may be included in a single issue of local improvement bonds.

SEC. 15. Whenever an assessment for any local improvement shall have been confirmed, and twenty days shall have elapsed since the first publication of notice of such confirmation, the governing body may by resolution direct that the amount and proportion of the expense of such improvement which shall have been assessed upon the abutting property,

or any part of such expense, shall be raised by the municipality by the issuance of its bonds, to be known as "Assessment Bonds." Such bonds shall be made payable in not less than five and not more than ten substantial equal annual installments, the last of which shall become due not less than five nor more than ten years after the issuance of the bonds. All moneys derived from the collection of assessments upon which assessment bonds are predicated, collected after the passage of the resolution authorizing such bonds, shall be placed in a special fund, to be used only for the payment of the principal and interest of assessment bonds issued under this act; and if at the time of the annual tax levy for any year in such municipality it shall appear that such fund will be for any cause insufficient to meet the principal and interest of such bonds maturing in such year, the amount of the deficiency shall be included in such tax levy. The amount of the assessments for two or more improvements may be included in a single issue of assessment bonds.

SEC. 16. Bonds authorized to be issued by this act shall be of such denomination, bear such rate of interest, not exceeding 6 per centum per annum, and be payable at such places, and be in such form as the governing body may by resolution provide. Such bonds shall be signed by the mayor or other chief executive officer, and the clerk of the municipality issuing them, and shall bear the seal of such municipality. Coupons attached to such bonds shall bear the *facsimile* signature of one or more of the said officers. Such bonds may be either coupon bonds or registered bonds, or coupon bonds with the privilege of registration as to principal only, or of conversion into bonds registered as to both principal and interest. They may be sold at public or private sale, but for not less than their par value. They shall recite that they are issued pursuant to the authority of this act and of the resolution authorizing

the issuance thereof which shall be conclusive evidence of their validity, and of the regularity of their issuance.

SEC. 17. The full faith and credit of a municipality shall be pledged for the payment of the principal and interest of all of its local improvement bonds, assessment bonds, notes and other obligations issued under this act. For the purpose of paying such principal and interest the governing body shall have power to levy sufficient taxes upon all the taxable property in the municipality and to borrow money temporarily upon notes of the municipality in anticipation of taxes of the same or the succeeding fiscal year.

SEC. 18. That this act shall be in force from and after its ratification.

In the General Assembly read three times and ratified this the 27th day of February, 1915.

JAN 19 1923
WM. R. STANSB
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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922

No. 251

DURHAM PUBLIC SERVICE COMPANY, PLAINTIFF IN ERROR,

vs.

THE CITY OF DURHAM.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

BRIEF OF DEFENDANT IN ERROR

S. C. CHAMBERS,
City Attorney of the City of Durham,
Attorney for Defendant in Error.

JONES FULLER,
R. P. READE,
Of Counsel.

(28,654)

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BRIEF OF DEFENDANT IN ERROR

Brief of Argument

I.

No contractual relationship exists between the parties out of which the plaintiff in error can claim exemption from the obligation of paying the assessment.

A. The charter-franchise granted by the Legislature (fols. 16-24) is silent on the subject, and the ordinance provision (fol. 28) relied upon creates no such exemption.

B. The parties lacked authority to contract relative to matters growing out of an exercise of the

1. Police power.
2. Taxing power.

II.

The assessment is fair and represents only the actual cost of the improvement of company's roadbed, the requirements of the statute, as admitted, having been strictly followed, which legislation the Supreme Court of North Carolina, (fols. 55-59) held to be reasonable.

ARGUMENT

1.

The assessment was levied under authority of an "Act relating to local improvements in municipalities," chapter 56 of the Public Laws of 1915 (Consolidated Statutes of North Carolina, secs. 2703 to 2717, inc.), which act confers upon the municipalities the power to pave streets and assess the cost thereof against abutting property owners according to the "front-foot rule," providing further that where street railway tracks are laid in the street or streets to be improved that the company occupying such street or streets shall pave that portion of the street where tracks are laid, "with such material and of such character as may be approved by the governing body, in that part of such street or streets or part thereof which the governing body may prescribe, not to

exceed, however, the space between the tracks, the rails of the tracks, and eighteen inches in width outside of the tracks of such company, and unless such improvement shall be made on or before a day specified in such resolution, the governing body will cause such improvement to be made:

> "*Provided, however,* That where any such company shall occupy such street or streets under a franchise or contract which otherwise provided, such franchise or contract shall not be affected by this section, except in so far as this act may be consistent with the provisions of such franchise or contract."

When this Court is called upon to decide whether State legislation impairs the obligation of a contract, it must determine for itself whether there is a contract and what its obligation is, as well as whether the obligation has been impaired.

> *Detroit United Ry vs. Detroit,* 242 U. S., 249.
> *Milwaukee Elec. Ry. & Lt. Co. vs. Wisconsin,* 252 U. S., 100; 40 Sup. Ct., 306.

The State having conferred upon the city the control of the streets and roads within its borders it is clear that the Legislature had no intention of depriving the governing body of the city of such continued control, by stipulating in the charter-franchise of the company granted by the Legislature, session 1901, that the company should first obtain permission of the Board of Aldermen to do the *work authorized* in the *"roads, avenues, lanes, alleys and other public highways of the city."*

In granting this permission the Board of Aldermen, acting in its legislative capacity, enacted certain regulations relative to the *"work authorized to be done," "in, over and along the roads, avenues, lanes, alleys and other public highways in the city."* It is out of these regulations plaintiff in error would

create a contractual relationship exempting it for all time from the payment of an assessment covering street paving, duly levied under subsequent legislative authority.

A glance at the pertinent part of these regulations discloses that the Company was required to locate its tracks in the center of the streets; poles, wires and appliances to be erected under supervision of the street commissioner; streets to be repaired and restored after poles, wires and appliances are erected and placed; track must follow grade designated, and further, "The Durham Traction Company, whenever it shall be required to do so, shall cause its roadbed and track to be brought to surface grade at its own expense and cost, but *nothing herein* contained *shall be construed* to *require* the *Durham Traction Company to pave* its roadbed, but it shall be required to restore its roadbed to the condition it was at the time of laying said track," &c.

We admit that the ordinance granting the permission to do the *work authorized* is barren of any regulation relative to paving. We concede that nothing therein can be construed requiring the company to pave. The language of the proviso prohibiting a different construction creates nothing, and leaves the ordinance silent so far as the subject of paving is concerned.

Considering the parties involved, the privileges sought, the rights granted, the nature of the *work authorized*, and the nature of the conditions and regulations imposed, we respectfully urge that perpetual immunity from the duty of paying, or exemption from the payment of an assessment covering such work, at such time as a future governing body may order, acting under legislative authority, cannot be implied. And here we would invoke the rule that grants to use the public streets must be strictly construed, any doubt being resolved against the grantee and in favor of the city.

In *Cleveland Electric Railway Company vs. Cleveland*, 204 U. S. 51 L. Ed. 405, this Court said:

> "It is a matter of common knowledge that grants of this character are usually prepared by those interested in them, and submitted to the Legislatures with a view to obtain from such bodies the most liberal grants or privileges which they are willing to give. This is one among many reasons why they are to be strictly construed."

We submit therefore that no such franchise or contract, as contemplated by the Legislature, exists between the parties, which is excepted by the proviso of the Act of 1915. We submit that it is a matter of common knowledge that street railway companies are usually required to pave and keep in repair their rights of way over the streets in conformity with the improvements made by the local authorities, and that the Legislature had no intention of exempting any street railway company from the obligation imposed, but merely intended to provide that where a company occupied the streets under a franchise or contract, *sanctioned by the Legislature*, where lesser or greater areas were to be paved by the company, that then and in that event such franchise was not to be affected, except in so far as the Act may be consistent with the provisions of such franchise or contract.

B.

(1) Moreover, the city possessed no power or authority to enter into a contract with the company to the extent of relieving it from the duty of paving its roadbed at such time as a future governing body might find necessary; the charter-franchise granted the company by the Legislature is silent on the subject and the power is wanting elsewhere. We contend that the subject of paving is a matter rightfully coming under an exercise of the police power, outside the domain of contract, certainly to the extent of granting perpetual im-

munity from the obligation, and point to present street traffic conditions and problems universally existing as compared with those existing in 1901, which furnish a striking illustration of why a governmental legislative body should not be permitted to cede, contract, or barter away its right to enact suitable legislation when demanded in the interest of public safety and welfare.

By the Act of 1915 the Legislature conferred upon the municipal authorities of the State the power to make the improvements as therein provided, and expressly delegated the power to order a street railway company to pave its roadbed, and upon failure of the company to act, the municipality was authorized to have the work done and assess the cost thereof against the company.

> In *State vs. Austin*, 114 N. C., 856, the Court said: "Authorities need not be cited to prove that the Legislature of the State may transfer to local municipal legislative bodies created by it the duty and responsibility of exercising a portion of its own police power."

The City could not by contract with the Durham Traction Company deprive itself of the right to exercise its police power—the right to enact suitable legislation in the interest of the public safety, convenience and welfare is a continuing power which no governing body has the right to either expressly or impliedly cede or grant away.

In *Northern Pacific Railway Company vs. State of Minnesota ex rel. City of Duluth*, 208 U. S., 583; 28 Sup. Ct. Rep., 345, this court say:

> "There can be no question as to the attitude of this court upon this question, as it has been uniformly held that the right to exercise the police power is a continuing one: that it cannot be contracted away, and that a

requirement that a company or individual comply with reasonable police regulations without compensation is the legitimate exercise of the power, and not in violation of the constitutional inhibition against the impairment of the obligation of contracts. In New York & N. E. R. Co. *vs.* Bristol, 151 U. S., 556, the doctrine was thus laid down by Chief Justice Fuller, speaking for the court: 'It is likewise thoroughly established in this court that the inhibitions of the Constitution of the United States upon the impairment of the obligation of contracts, or the deprivation of property without due process, or of the equal protection of the laws, by the States, are not violated by the legitimate exercise of legislative power in securing the public safety, health, and morals. *The governing power of self-protection cannot be contracted away, nor can the exercise of rights granted, nor the use of property, be withdrawn from the implied liability to governmental regulations in particulars essential to the preservation of the community from injury.*"

Facing changed conditions it was for the City to say what the public safety, conveniences and welfare required.

In the case of *Milwaukee Elec. Ry. & Lt. Co. vs. State of Wisconsin ex rel. City of Milwaukee*, 252 U. S., 100, this court say:

> "As the ordinance did not, as a matter of contract, preclude regulations in respect to paving, it was for the city to determine, in the first instance, what the public necessity and convenience demanded."

The Supreme Court of North Carolina, in discussing the point, say:

> "The ordinance is dealing and intends to deal only with things there required and under conditions then

> existing. There is nothing that purports to affect the future, nor which could prevent the city government under more advanced conditions in the exercise of the power conferred for the public good from enacting ordinances that its streets be paved and that this railway as an abutting owner should bear its proper proportion of the cost."

It is a proper exercise of the police power to require a street railway company to pave its roadbed.

In *City of Raleigh vs. Carolina Power & Lt. Co.*, 180 N. C., 236, the court say:

> "It is manifestly true that in this day of multitudinous motor vehicles and other conveyances, the safety of the citizen requires that street-car tracks shall be in the center of the street. * * * We are also of the opinion that the plaintiff had the right to compel the defendant to pave the tracks and the one foot on each side, and also to pave the space between the tracks. * * * For the safe and convenient use of the public street it is as much necessary to pave the space between the double track as it is to pave the space between each individual track. This authority is not only given the plaintiff, we think under the franchise, *but it is a proper exercise of the police power.*"

Plaintiff in error contends that the Supreme Court of North Carolina in quoting the ordinance provision relied upon "inadvertently placed in it the word 'wherever' instead of 'whenever'." We think that this was merely a typographical error, as the Court correctly quoted the provision at the outset. (fol. 55.) We submit that a grant to use the streets should not be frittered away by construction, but should be held up by the four corners, the power to make the same, and the grant itself being fully examined, and given a fair construction.

The Constitution of North Carolina, article VIII, section 1, reserves to the Legislature the power to alter or repeal the charters of corporations other than municipal, and under this power the Legislature of 1915 saw fit to enact the requirement that street railways in municipalities should improve that portion of the street where their tracks are laid.

In *Fair Haven & Westville Railroad Co. vs. City of New Haven*, 203 U. S., 379; 27 Sup. Ct. Rep., 78, this court say:

> "This company was given the right to occupy the streets. It exercised this right first with a single track, and afterwards with a double track. Before granting the right the State could have, and reasonably could have, put upon the company the duty of paving as well as repairing. Such requirement would have been consistent with the object of the grant. It is yet consistent with the object of the grant. It is not imposed in sheer oppression and wrong, and the good faith of the State cannot be questioned. It is imposed in the exercise of one of the public rights of the State—the establishment, maintenance, and care of its highways."

(2) The assessment was levied under the taxing power, which power the city could not and did not contract away.

> "The authority of the Legislature, either directly or through its local instrumentalities, to exercise the *taxing power*, in the form of local or special assessments, has been so firmly established in this and other States of the Union, that it can hardly at this late day, be considered an open question."
>
> Raleigh *vs.* Peace, 110 N. C., 36.

In discussing this point, the Supreme Court of North Carolina say (fol. 56):

"The power to impose these assessments for local improvements is properly referred to the sovereign power of taxation and it is the accepted principle of interpretation that no license, permit, or franchise from a municipal board or from the Legislature itself will be construed as establishing an exemption from the proper exercise of this power, or in derogation of it, *unless these bodies are acting clearly within their authority and the grant itself is in terms so explicit as to be free from any substantial doubt.*"

Railroad vs. Allsbrook, 110 N. C., 137, affirmed on writ of error in 146 U. S., 279.

Cleveland Elec. Ry. Co. vs. City of Cleveland, 204 U. S., 116.

Sioux City Street Ry. vs. Sioux City, 78, Iowa, affirmed on writ of error in 138 U. S., 98.

Railway Co. vs. Philadelphia, 101 U. S., 528.

In *Sioux City Street Ry. Co. vs. Sioux City et al.*, 137 U. S.; 11 Sup. Ct. Rep., 229, this court say:

"The company took its franchise subject to such legislation as the State might enact. * * * The General Assembly deemed it necessary for the public good to require street railways to pay for the paving of one foot outside the tracks, probably upon the view that it was right that they should be required to pave that part of the street which they used almost exclusively. It was not in the power of the city by contract with the company to deprive the Legislature of the power of taxing the company. * * * The question raised in the present case relates solely to taxation, which is a matter under the authority of the State. Moreover, the city derived from the State alone the power to grant a license to the company. The right to operate a railway in the streets is a franchise obtained through power given to the city by the State, but

the State reserves the power to regulate such franchise and impose conditions upon it. It reserved the power to determine the question of the exemption of the company from taxation, and to prescribe what burdens should be imposed upon it for the public good, in the enjoyment of its franchise. Manifestly, such power of the State would exist, if the right to occupy the streets with tracks were granted to the company directly by an act of the Legislature of the State, and the case is not changed by the fact that the franchise was granted by the city. * * * No question can arise as to the impairment of the obligation of a contract, when the company accepted all of its corporate powers subject to the reserved power of the State to modify its charter and to impose additional burdens upon the enjoyment of its franchise."

II.

Plaintiff in error complains that the assessment is arbitrary, oppressive, and discriminatory. We think this contention without merit. The reports are filled with decisions requiring street railways to pave and keep in repair their rights of way, statutes are numerous imposing the obligation, and the fact that the exercise of the power is of such general application is of itself evidence that the requirement is regarded as a reasonable and just one. In the instant case, the city, acting under legislative authority, assessed the company with the actual cost of improving a strip eight feet wide where single track was used and a strip eighteen feet seven inches wide where double track was used, which the Supreme Court of North Carolina pointed out, "was well within the statutory provision."

The determination of the area to be paved at the expense of the railway company, we submit, was solely a matter of legislative discretion, subject only to judicial relief in case of

actual abuse of power or of substantial error on the part of the municipal authorities in executing the power conferred, neither of which is here shown, much less asserted.

Hancock vs. City of Muskogee, 250 U. S., 454; 39 Sup. Ct. Rep., 530.

Goldsmith vs. George G. Prendergrast Const. Co., 252 U. S., 12; 40 Sup. Ct. Rep., 272, 274.

To sustain its position plaintiff in error would compare the amount of the assessment levied against it with the amount levied against abutting property owners, an erroneous comparison, for the reason that company's property belongs to a different class—a franchise to use the streets of the city, carrying with it the power of eminent domain, certainly a just basis for the classification made by the statute.

The Supreme Court of North Carolina has found similar legislation to be reasonable, and the burden to be borne by a street railway company to be just.

> "Where legislative authority is given a city to pave its streets and assess one-third of the cost against the property owners on each side thereof, with the further provision that whenever a railroad or street railway is located thereon it may be required to grade and pave that portion of the street to a certain width, &c., constituting the cost a charge against the railroad, &c., to be collected by appropriate action, the charge against the company should be regarded as a primary liability which will relieve the owners upon the street where the railway is located, as well as the city, of that part of the expense."
>
> *Morris vs. Hendersonville*, 168 N. C., 400.

In the instant case the Supreme Court of North Carolina, speaking to the point, quoting from *Felmet vs. Canton*, 177 N. C., 52, say:

> "The authority conferred by statute upon municipal corporations to assess lands abutting upon the streets for public local purposes comes within the power of taxation and is largely a matter of legislative discretion, usually held to be conclusive as to the necessity of the improvement, and the amount only becomes a judicial question in cases of palpable and gross abuse."

Plaintiff in error does not assert any abuse of the power conferred or error in its execution, consequently the assessment we submit must stand—the privilege to pay in equal annual installments, as provided by statute, being preserved.

Bell's Gap Railroad Co. vs. Pennsylvania, 134 U. S. 232; 10 Sup. Ct. Rep., 535.

Heisler vs. Thomas Colliery Company, U. S. Sup Ct., decided October term, 1922.

Louisville & Nashville Railroad Co. vs. Barber Asphalt Co., 195 U. S., 219; 25 Sup. Ct. Rep., 467.

Detroit vs. Parker, 181 U. S., 399.

Davidson vs. New Orleans, 96 U. S., 97.

Plaintiff in error may apply to the Corporation Commission of North Carolina for an increase in passenger rates if its return from its street railway is insufficient, notwithstanding it incorporated in its so-called contract, a provision that the maximum fare for one continuous trip between two given points should be five (5c.) cents. Changed conditions justified the Corporation Commission in granting increases heretofore, but merely because the company's street-railway department failed to produce a satisfactory return for the period mentioned, while its net earnings from all sources during said period amounted to $147,000. is not sufficient reason to relieve plaintiff in error from the obligation imposed.

Milwaukee Elec. Ry. & Lt. Co. vs. Wisconsin, 252 U. S., 100; 40 Sup. Ct. Rep., 306.

It is therefore respectfully submitted that the judgment of the Supreme Court of North Carolina should be affirmed.

S. C. CHAMBERS,
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Attorney for Defendant in Error.

JONES FULLER,
R. P. READE,
Of Counsel.

2. An assessment against a street railway company for paving between and near its tracks and rails, greater than the amount assessed, for the rest of the pavement, on abutting lots valued much higher than the railway property on the street, *held* not arbitrary and unreasonable. P. 152.
3. Imposition of special obligations on railway companies in respect of street paving is consistent with reasonable legislative classification. P. 154.

182 N. Car. 333, affirmed.

ERROR to a judgment of the Supreme Court of North Carolina sustaining an assessment for street paving levied against the plaintiff in error street railway company. Certiorari also was applied for and denied.

Mr. James S. Manning, with whom *Mr. W. L. Foushee* and *Mr. John H. Manning* were on the brief, for plaintiff in error.

Mr. S. C. Chambers, with whom *Mr. Jones Fuller* and *Mr. R. P. Reade* were on the brief, for defendant in error.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

As the cause is properly here upon writ of error—*Atlantic Coast Line R. R. Co.* v. *Goldsboro*, 232 U. S. 548, 555; Act September 6, 1916, 39 Stat. 726—we deny the petition for certiorari.

Plaintiff in error was incorporated by the Legislature of North Carolina in 1901 and empowered to operate car lines in the streets of Durham when so authorized by the municipal authorities. Shortly thereafter and in pursuance of an agreement they granted the necessary authority. The Supreme Court of North Carolina—182 N. Car.

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of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity, may be reexamined and reversed or affirmed in the Supreme Court upon a writ of error. . . ."

333—affirmed a judgment of the Superior Court which sustained an assessment of $102,942.30 made in 1920 against the corporation for the cost of paving that portion of Main Street occupied by its tracks. It refused to make the improvement as required by an ordinance; thereupon the City caused the work to be done and assessed the cost against it. The formality of the proceeding is not questioned.

Recovery is resisted upon two grounds—(1) That the original contract under which the railway lines were constructed and operated exempts the corporation from liability to pave the roadbed. Constitution, § 10, Art. I. (2) That the assessment is excessive, unreasonable and wholly arbitrary and to enforce it would deprive plaintiff in error of property without due process of law and deny it the equal protection of the laws contrary to the Fourteenth Amendment.

The original contract with the City is dated February 4, 1901, and the claim of exemption rests upon the following clause therein—

"The said Durham Traction Company [now the Durham Public Service Company] whenever it shall be required so to do, shall cause its roadbed and track to be brought to surface grade at its own expense and costs, but nothing herein contained shall be construed to require said Durham Traction Company to pave its roadbed, but it shall be required to restore its roadbed to the conditions in which it was at the time of laying said track, provided, however, that if the city decides to put in or change its sewerage pipes on any of the streets of the said city on which the tracks of said Durham Traction Company may be laid, the said city may require the said Traction Company to remove and replace at its own expense, the said tracks, for said purpose and said city shall incur no liability for any delays or interruptions of the business or traffic of said Traction Company, caused thereby."

The court below held that while this contract imposes

no liability for paving, neither does it grant exemption therefrom. And we agree with their conclusion. Such exemptions must plainly appear. The general rule is that doubts as to provisions in respect of them must be resolved in favor of the municipality or State. *Cleveland Electric Ry. Co.* v. *Cleveland*, 204 U. S. 116, 130.

Purporting to proceed under "An Act Relating to Local Improvements in Municipalities," ratified by the General Assembly of North Carolina, February 27, 1915,—c. 56—the governing body of Durham by resolution provided for improving Main Street and directed plaintiff in error to pave between and for eighteen inches outside its tracks. The company refused to comply and the challenged assessment followed. Among other things the Act of 1915 provides—

"Sec. 4. Every municipality shall have power, by resolution of its governing body, upon petition made as provided in the next succeeding section, to cause local improvements to be made and to defray the expense of such improvements by local assessment, by general taxation, and by borrowing, as herein provided. . . .

"Sec. 6. . . . If the resolution shall provide for a street improvement, it shall direct that any street railway company or other railroad company having tracks on the street or streets or part thereof to be improved shall make such street improvement with such material and of such a character as may be approved by the governing body, in that part of such street or streets or part thereof which the governing body may prescribe, not to exceed, however, the space between the tracks, the rails of the tracks, and eighteen inches in width outside of the tracks of such company, and that unless such improvement shall be made on or before a day specified in such resolution, the governing body will cause such improvement to be made: *Provided, however,* that where any such company shall occupy such street or streets under a franchise or contract which

otherwise provided, such franchise or contract shall not be affected by this act, except in so far as this act may be consistent with the provisions of such franchise or contract. . . ."

By agreement of parties, the cause was tried without a jury and the court found the facts. Those so found and presently relied upon to show the arbitrary and unreasonable character of the assessment follow—

"That the section of Main Street over which the assessment extends is 2.02 miles in length and including double tracks there are 2.65 miles of track on Main Street; that there are 154 abutting property owners upon this portion of Main Street; that the assessment against said company for paving Main Street is $102,942.30 and against said 154 property owners is $89,909.56; that the value of the property of this defendant on Main Street within the area which is directly affected by said paving is $100,000 and the assessed value of said abutting property is approximately $5,083,250 exclusive of the value of property on Main Street not taxed.

"That the cost to the Traction Company of furnishing new rails and new cross ties, of taking up and relaying its track on Main Street and doing other work preparatory to the placing of the pavement upon Main Street was $75,108.85, which has been paid by the Traction Company and which said outlay and expenditure was made at the order of the City of Durham; that during the twelve months ending May 31, 1921, the company's railway showed a loss of $17,388.73 of meeting the operating expense and allowance for depreciation and if the Company is required to pay the paving assessment of the City of Durham as demanded, to wit, one-tenth of said assessment each year with interest, then there will be an additional expense of one-tenth of $102,942.30 plus interest and depreciation on same; that the gross earnings of said company from all sources for the year ending De-

cember 31, 1920, were approximately $540,000, the net earnings $147,000, the company having other valuable property and business not on Main Street, including other railway not on Main Street."

The court below held the recited facts insufficient to show that the municipal authorities acted unreasonably or arbitrarily, and we are unable to say that this was error. Counsel concede that the Constitution of North Carolina reserves to the Legislature power to alter or repeal corporate charters; also that, in general, the Legislature either directly or through recognized governmental agencies may impose assessments for local improvements and prescribe the basis of apportionment. But the claim is that the Legislature undertook arbitrarily to direct plaintiff in error to pave more than one-third of the street, while the owners of more valuable property fronting thereon are required to pay out much less and are assessed upon the front-foot basis.

Gast Realty & Investment Co. v. *Schneider Granite Co.*, 240 U. S. 55; *Hancock* v. *City of Muskogee*, 250 U. S. 454; and *Kansas City Southern Ry. Co.* v. *Road Improvement District*, 256 U. S. 658, are cited in support of this insistence; but they do not go so far. The power of the Legislature to make reasonable classifications and to impose a different burden upon the several classes cannot be denied. There are obvious reasons for imposing peculiar obligations upon a railway in respect of streets occupied by its tracks. The facts and circumstances disclosed by the present record are not sufficient to justify us in overruling the judgment of the state court, which held that the assessment was not the result of arbitrary or wholly unreasonable legislative action. *Sioux City Street Ry. Co.* v. *Sioux City*, 138 U. S. 98, 107, 108; *Fair Haven & Westville R. R. Co.* v. *New Haven*, 203 U. S. 379, 388, 389; *Southern Wisconsin Ry. Co.* v. *Madison*, 240 U. S. 457, 461; *Great Northern Ry. Co.* v. *Clara City*, 246 U. S.

434, 436, 437; *Pacific Gas & Electric Co.* v. *Police Court*, 251 U. S. 22, 25, 26; *Milwaukee Electric Ry. Co.* v. *Milwaukee*, 252 U. S. 100, 104.

Affirmed.